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# AN INTRODUCTION

TO

# MUNICIPAL LAW.

DESIGNED FOR

*GENERAL READERS, AND FOR STUDENTS IN COLLEGES AND HIGHER SCHOOLS.*

BY

JOHN NORTON POMEROY,

COUNSELLOR-AT-LAW.

SECOND EDITION.

SAN FRANCISCO:

BANCROFT-WHITNEY CO.

LAW PUBLISHERS AND LAW BOOKSELLERS.

1886.

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TO

MARTIN B. ANDERSON, LL.D.,

PRESIDENT OF THE UNIVERSITY OF ROCHESTER,

AT WHOSE SUGGESTION THIS WORK WAS UNDERTAKEN

IT IS DEDICATED,

AS A SLIGHT EXPRESSION OF ADMIRATION

FOR HIS

VARIED ACQUIREMENTS,

AND

RESPECT FOR HIS EXALTED CHARACTER.

# PREFACE

TO THE

# SECOND EDITION.

---

In publishing a new and somewhat revised edition of this book, I desire to express my sincere thanks for the approval which it has met from jurists and scholars most competent to pass judgment upon such a work. As its whole scope and design were new, as it was intended for the use of general readers, of students in colleges and higher schools, and as introductory to the course of professional studies by law students, it differs both in plan and mode of treatment from the ordinary legal text-books. Its original method has not been departed from in preparing a new edition. Some alterations have been made in order to give the result of recent decisions upon an important subject, and an index has been added, which was wanting in the first edition; but the text is substantially unchanged. The last part, which contains an outline of our civil jurisprudence, is intentionally brief and element-

ary, for the use of general readers and college classes, and not designed to take the place, in a course of professional study, of such institutional writers as Kent and Blackstone. The historical and by far most important portion contains the results of modern scholarship, English, German, and French, taken from works of the highest authority, which are not ordinarily found in the lawyer's library, and many of which are not always accessible by the general reader. Historical errors, into which Lord Coke, Blackstone, and other legal text-writers have fallen, while describing the primitive condition of our institutions and jurisprudence, are tacitly corrected under the light of more recent research. I make no claim, of course, to any originality of historical investigation; but I think that the reader and student will here find many facts concerning the origin, progress, and nature of the Roman Law, and its influence upon the development of European civilization during the Middle Ages, concerning the Saxon polity and institutions, the institutions and codes of the Germanic tribes who overthrew the western Roman Empire, the origin, development, and nature of Feudalism, and concerning the effect of all these social forces upon the English institutions and jurisprudence, which he must otherwise learn from the elaborate treatises of German and French jurists, and from the works of the ablest modern English scholars.

It is also proper to say that no other work in our language, with which I am acquainted, attempts to give in so full and systematic a manner the true *rationale* of the law as created by judicial decision; to explain the powers

of judges as legislators, and their mode of operation in enacting a system of legal rules by means of successive decided cases; to describe the large portion of our jurisprudence gradually constructed in this manner by the legislative action of the judiciary; and especially to point out the striking analogies between the functions and methods of our courts in thus developing the common law and equity, and those of the Roman prætors and magistrates in developing the Roman law by means of their successive edicts. It is certainly remarkable that the standard English legal text-writers have either wholly ignored or completely misrepresented this peculiar element of our jurisprudence, which more than anything else has rendered it capable of a constant and uniform improvement, and which distinguishes it from the jurisprudence of the continental nations of Europe. Jeremy Bentham, it is true, recognized the *fact* of such a peculiar feature belonging to the English law; but his shallow criticism failed to comprehend its real nature, and only condemned and ridiculed it under the disparaging name of "judge-made law." Austin, who was in some respects a disciple of Bentham, but who was, unlike his master, a profoundly able and scholarly jurist, fully appreciated the legislative functions of the courts, and the fact that they have built up a large part of our jurisprudence; but he makes no attempt to give a full explanation of the *rationale* of their powers and methods in creating the law of judicial decision. Blackstone explains the process by gravely uttering the absurd fiction that the law has existed from time immemorial in a complete and perfect condition, unknown to

the mass of mankind, but in some unaccountable manner preserved in the knowledge of the courts, and that the judges have revealed or declared it to the world from time to time as the necessities of litigants required.

The opinions maintained in this portion of the book, as to the superiority of the law of judicial decision over that of codes, is so opposed to much of the tendency of modern thought and practice, that a few words, in this connection, by way of comment upon my positions, may be permitted. It is true that codification has many advocates among able members of the English Bench and bar, who have been influenced partly by the teachings of Austin, and partly by the example of the continental nations of Europe. This tendency has expressed itself in complete codes enacted for the British East India dominions, some of which perhaps approach as near as possible to the ideal of a perfect code. In our own country, the practical effects of the tendency are more plainly exhibited. In addition to the ordinary forms of statutory legislation covering entire departments of the law, more than half of the states and territories have adopted codes of civil procedure. In California the whole body of the law has *professedly* been embodied in different codes. The example of California has been followed in one or two other commonwealths; and it seems probable that New York will soon adopt a similar system, or at least a similar civil code.

No writer has more earnestly than myself advocated the essential elements and fundamental principles of the reformed procedure, and I have seen no reason to retract or modify those opinions. A reform accepted by so many

American states, by British colonial dominions, and by the English Bar, Judiciary, and Parliament, must have inherent and surpassing merits. But a code of procedure, enacting every minute rule of practice, pleading, and evidence into the iron form of a statute, is a very different thing. Under such a system the courts have no freedom to adapt the rules of practice to the extraordinary circumstances of individual cases, in order to promote justice, and as a consequence gross injustice is often done to suitors by decisions rendered upon most trivial matters of form not in the slightest affecting the merits. When every step in a cause, every proceeding on the trial, and even the order in which such proceedings shall be taken, are prescribed in the most minute and detailed manner by statute, the inevitable tendency of the courts is to regard and treat these statutory rules as imperative and compulsory. It may be answered that such statutory provisions are simply directory, and their violation is not error; but experience shows that courts do not and can not escape from the tendency to deal with such statutory requirements as obligatory, no matter how purely formal they may be, and to hold that any departure from them is error invalidating the decision or judgment, and demanding a reversal or a new trial. My limits do not permit me to illustrate this statement by actual examples; but an examination of the reports will show most clearly, that in some of the states which have adopted these elaborate codes of procedure, the anticipated result of the reform, viz., the decision of all causes upon their merits alone, is very far from being attained. In my opinion the reform was more wisely carried on in England; the few

essential elements and general principles of the new system only were embodied in the statute; the great mass of special rules governing the practice was left for the courts to establish, so that they should preserve their elasticity, and be applied by the judges for the furtherance of justice in all possible circumstances. The legislature of Connecticut, on the recommendation of leading members of the state Bar, has recently accepted the English system in all of its substantial features.

It is perhaps inevitable that the system of codifying the private civil jurisprudence—the common law and equity—shall finally prevail in this country and in England. One fact, however, is true, if any certain conclusion can be drawn from both reasoning and experience. The benefits which are claimed for the system of codification avowedly belong only to a complete code—a code which shall embody the entire existing civil jurisprudence of the state, absolutely all of the legal rules which are recognized as operative, whether originally created by statute or by judicial decision. Such a code should cover the whole domain of civil jurisprudence, so that courts should find in it the source of all their decisions, and should never be obliged to go behind it and borrow a rule from the pre-existing common law or equity. Austin, who is the leading advocate of codification among the English jurists, bases all his reasoning upon such a complete and exhaustive code; but while holding it up as an ideal, he fully admits the great difficulty of framing a code which shall at all fulfil the conception and produce its anticipated benefits. It seems to me that reasoning and experience alike show, that a mere partial civil code, a code

which only professes to contain elementary definitions, the most general doctrines, and a few special rules, leaving the great mass of practical rules and doctrines still existing as a part of the common law and equity by its side, is only an additional source of uncertainty and confusion introduced into the jurisprudence of a state.

J. N. P.

SAN FRANCISCO, *February 8th, 1883.*
Hastings College of the Law.

# PREFACE.

This work is intended primarily for the use of students in higher schools and colleges, and of those readers who wish to obtain some knowledge of the spirit of our municipal law, but have no desire to pursue the study professionally. Its object, therefore, is not to take the place of the standard treatises of Sir William Blackstone, of Chancellor Kent, or of other authors, but to supply a need for which those commentaries were never designed.

Beyond all doubt, the study of History and of Politics is too much neglected in most of our higher educational institutions. The instruction given in legal science is generally confined to a few lectures upon the Constitution of the United States; while the great body of our municipal law, which is meeting us at every side in actual life, is passed by as something foreign to the purposes of a liberal education.

It cannot be denied that this is a great defect in the courses of study adopted in most of our colleges. So much is demanded from the educated men of our country; our form of government, political ideas, jurisprudence, and civilization are so completely the product of the past, that an intimate acquaintance with history would seem to be an es-

sential element in the education of American citizens. Especially is this true of that portion of history which embodies the origin and development of the national jurisprudence. Both the external form and the animating spirit of our municipal law are such, that it cannot be compressed into a short and precise statement of rules, and thus be made readily accessible to the whole people. Its character and that of our language are very similar. The germs of both are found among peoples widely scattered and different; both have been powerfully affected by the union of several races into one nationality; both have steadily developed, and are constantly changing; and in both an unbroken chain connects the forms and principles of to-day with those of the most remote periods.

The general student, then, whether still within the seclusion of a college, or engaged in the active duties of life and burdened with the grave responsibilities of citizenship, does not need a mere synopsis and outline of the various rules which form the body of the municipal law as it is now administered. In connection with this more practical knowledge, he should be led to study our legal system as a whole; to mark those forces which have moulded it, and, through it, the civilization of the nation; to investigate the character of the influences now at work upon it; to examine its peculiar form of growth; to compare it in these respects with the legislation of other countries; and thus to be able to weigh its excellences and defects, and, in his capacity as citizen, to do whatever is possible toward its improvement and final perfection.

This result has been kept constantly in view in the preparation of the present work, although I am painfully con-

scious that the execution falls far short of the purpose. The general divisions of the subject, which are quite different from those contained in professional text books, are made to lead the reader in what I conceive to be a natural order; showing to him, first, the external forms of the law, and the various means by which its rules become clothed with a compulsive character; secondly, the national sources from which many of its more important principles have been drawn; and, finally, a general outline of its positive rules which relate to private rights. In this outline I have dwelt with some fulness upon the status of persons, and upon personal rights, because among these are found most of the important questions involved in our National and State Constitutions, which affect the welfare of individual citizens. The whole subject of the criminal law, however, is omitted, because its rules are generally based upon statutes, and are therefore very different in the several States, and because the limits of the work forbade any further addition.

In preparing the first and second parts, I have consulted a large number of works of the highest authority, and a list of the most important of these is given at the close of this preface. In the chapters upon the Anglo-Saxons, the Feudal System, and the Roman Law, while I claim no merit but that of careful study and compilation, I think there will be found in a short space, the substance of what is elsewhere scattered through many and expensive volumes. If this work should be thought too extended to be used entire as a text book, some of these chapters may be omitted; although a study of the feudal system is absolutely necessary, and of the Roman jurisprudence greatly ad-

vantageous, to a comprehension of the genius of our own municipal law.

While the work is primarily designed for general students and readers, I hope that some portions of it, at least, will be found instructive to professional students and practising lawyers. To the former, the first and second parts will be a proper introduction to the reading of Kent and Blackstone, and part third will present a bird's-eye view of the whole ground which they are to examine more closely and thoroughly in their preparatory training.

The copious table of contents is intended, not simply as a means of reference, but as a complete analysis of the whole book, and of each chapter, and as such will be an important help both to teachers and students.

I have not cited authorities in support of the various statements and propositions contained in the text, for the work has no claim to be one of original research, nor is it intended for use as a lawyer's handbook. For the convenience of those readers who may wish to pursue their investigations upon any subject, and to test the results given in the text by standard authorities, I add a list of such of the works consulted by me, as are not ordinary legal text books. In relation to the early periods of the English commonwealth, and the institutions of Western Europe during the middle ages—"The Rise and Progress of the English Commonwealth: the Anglo-Saxon Period," by Sir Francis Palgrave; "The Saxons in England," by John Mitchell Kemble; "History of England under the Anglo-Saxon Kings," by Prof. J. M. Lappenberg, translated by Benjamin Thorpe; "An Enquiry into the Rise and Growth of the Royal Prerogative," by J. Allen; "History of the Anglo-Saxons," by

Sharon Turner; "Ancient Laws and Institutes of England," containing a collection of Saxon codes; "History of Civilization in France," by M. Guizot; "History of Representative Government," by M. Guizot; "View of Society in Europe," by Gilbert Stuart; "History of the Norman Conquest," by M. Thierry; Robertson's "Charles V.;" Sullivan's "Lectures on Feudal Law;" "History of the Equitable Jurisdiction of the Court of Chancery," by G. Spence; "Histoire du Droit Romain au moyen Age," C. von Savigny, traduit de l'Allemand; "Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas," by Henry Sumner Maine.

Relating to the Roman law: "A History of the Roman Law," translated into French from the German of Prof. G. Hugo; Mackeldy's "Roman Law," translated from the German by Kauffman; "*Horæ Juridicæ*," by Charles Butler; "Histoire de la Legislation Romaine," par J. L. E. Ortolan; "De l'influence du Christianisme sur le Droit civil des Romains," par R. T. Troplong; Niebuhr's "History of Rome;" Arnold's "History of Rome."

J. N. P.

*December 22d*, 1863.

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# INTRODUCTORY CHAPTER.

§ 1. A KNOWLEDGE of the general principles, the bold outlines and grand features of our Municipal Law, should be considered an essential part of any liberal education and culture. The science of Law is multiform. It reaches out, seizes, and draws in its methods and materials from many departments; here it sends down a root into the undefined and almost hidden traditions of the past, and now supports itself upon the premises and conclusions of the purest and simplest morals; its deductions are sometimes cast in the mould of the severest logic, and again assume the form of historical narrative. It extends from the birth of a nation or race, over generations and centuries, to the busy life of the present day. It is, in short, the summing up of almost all knowledge not strictly physical. It demands a familiarity with history, with ethics, and with logic. Whatever we have learned elsewhere, will contribute its aid in our study of this comprehensive science.

§ 2. A study calling into active play and exercise so many faculties, and giving point and practical application to so many acquirements, should not be neglected by those who seek to attain that rounded completeness of character which is the result of a liberal education. Should we admire the literature of the ancient Romans, and pass by those institutions which grew up with the growth of the Roman people, and gave them much of their character, and

have been a legacy to the world, by the side of which their literature sinks into absolute insignificance? Should we gaze with wonder upon the shifting scenes of the Middle Ages, the turmoil and confusion, the haughty independence and abject servitude, the pomp and circumstance of chivalry, and the poverty and degradation of the laborer, and fail to see the solid and severe framework which supported all these outward appearances? Should we study the history of England, the rise and fall of dynasties, the terrible conflicts of opposing principles, the death-struggles between prerogative and liberty, and neglect to discover the real current of the nation's life which flowed on, bearing all these forms upon its bosom? Would we turn to philosophy, and nourish our minds with the eternal principles of right, and duty, and obligation, and refuse to learn how these truths have been applied in the thousand changing circumstances which make up the daily life? The law thus gathers up the separate threads of knowledge, of thought, and experience, and weaves them into a composite web, in which all their peculiarities are blended, while the whole fabric essentially depends upon each of its many elements.

§ 3. There are some special reasons directly connected with our political condition, with the structure of our State and National Governments, and the organization of society, which even more urgently demand an acquaintance with the ideas, spirit, growth, and history of the municipal law among educated men. To the general advantages attending the study of the law as a part of a liberal education, our political system adds the stronger claims of our obligations as citizens.

§ 4. 1. The fact that every citizen has a voice in the selection of legislators is a consideration of the highest importance in favor of a general diffusion of a knowledge of the law. By our several forms of State governments, the local legislatures are almost absolutely supreme, so far as regards those matters which are not withdrawn from them by

the Federal Constitution. They have the power, not only to pass those political measures which concern the general welfare, but also to modify, alter, add to, or abolish our whole system of municipal jurisprudence. When we reflect that not a session of a legislature passes without the most radical and sweeping changes being proposed and carried into effect, changes inevitably followed by results unseen and unexpected by their projectors; when we remember that it is within the power, and often within the will, of legislators, to strike away at one blow our whole legal system, and substitute some other in its stead, we can but feel that a solemn responsibility rests upon each individual elector in the choice of his representative; a responsibility which should be enlightened by some comprehensive and scientific knowledge of the law as a whole. Here, in the State of New York, we are being rapidly brought face to face with the great question, Shall we abolish our present system of jurisprudence, as an elastic, accommodating, developing free life, built up upon the accumulating decisions of courts, the spirit and methods of which we have inherited from our English ancestors, and supply its place with the fixed, unyielding, though distinct and sharply-defined form of a general code? I say, this question must, ere long, be met and answered in this State of New York, and doubtless in other commonwealths. Is it not of absolute necessity that there should be some element in the body of electors, which can guide public opinion and influence legislative will to the correct decision of this most important issue? It is generally conceded that the delegates to the National Congress should be chosen with some care, with some reference to their fitness for the station they occupy; but every good and wise citizen should remember that his worthy neighbor who is sent to the State Legislature, carries with him a power over the private interests of the people, immeasurably greater than that possessed by the national congressman. The latter is hedged round on every side by

constitutional restrictions, and can legitimately do nothing which is not pointed out by the organic law, while the other has full range, "ample scope and verge," wherein to exercise his public functions; he can do anything not forbidden by the Federal or local Constitution. The results of his innovating labors, whether good or bad, may make themselves felt in every man's entire relations, as a property holder, a husband, a father, or a neighbor. As all political power is, with us, so far forth derived from the people, that it there first finds its outward expression, there exists no country in which the necessity is so imperious, not only for the diffusion of intelligence among the citizens, but for the spread of the special knowledge of the municipal law. Sir William Blackstone urges the same consideration upon the educated youth of England, but with us the force of the argument is increased in a tenfold degree. We have no conservative order of hereditary legislators; change and fluctuation is the rule, not the exception; the people are called upon at short intervals to delegate their authority to representatives; the measures and policy of one year are forgotten and pass away the next; special legislation directed to particular evils, without any regard to the effect upon related subjects, is common, nay universal. We need a stable, self-contained, though moving and progressing balance, with power sufficient to guide and steady the governmental and social movements, and yet not so sluggish and inert as to obstruct and prevent them. That power is only to be found in a numerous class of thoroughly educated citizens.

§ 5. 2. But the argument is greatly strengthened when we reflect that every man not only has, placed in his keeping, the power and duty of joining in the choice of others to represent the public will and act for the public good, but he may himself be called upon to exercise the functions of a legislator. The responsibility in the election of representatives may be deemed so divided and reduced by being

shared with many thousand fellow voters, as to have but little weight, but upon the individual chosen to alter or conserve the laws, it must rest with overwhelming force. Legislators will, however, reflect the general opinion and culture of their constituents.

§ 6. 3. A third element in our social and political organization adds weight to the strength of the argument. Not only is the power of originating laws referable to the general body of citizens meeting in their electoral capacities, and through them to the delegates composing the State and National Legislatures; not only does the existence of any and all forms and systems of jurisprudence rest solely and finally in the collective will of the nation, but the people have the other, and perhaps even more practically important function of interposing in the actual administration of justice. Right at the very point where the law descends from its serene height of abstract right, and touches the individual, bringing its sanctions to bear upon him, and making itself felt as a restraining or an assisting power, there the people, not the magistrate, nor the official, step in and form the channels and instruments by which the theoretical code becomes practically efficient upon the lives, liberty, and property of men. Under our judicial and administrative machinery, it is not entirely the judge who is the organ of communication between the majesty of the supreme will and the individual suitor; it is even more the jury with whom the power rests of rendering the jurisprudence effective, or of measurably destroying its character and usefulness. The method of jury trial is certainly that which demands the highest culture among the citizens in order to realize its ideal benefits. The objections which are urged with the strongest force against the system are all based upon the fact that the people, the twelve representatives of the collective body, who sit as triers in any particular case, have not the qualifications essential to produce the actual good results of this intervention of laymen into

judicial disputes. We are bound to the jury trial by all the holiest traditions of our past history; we esteem it as the very bulwark of our liberties; it can only be given up by some great shock and social revolution; but to preserve the institution in its integrity, to make it a conserving and not a destructive element, demands a broad culture, a general diffusion of knowledge, an intimate acquaintance with the outlines of legal science, among those educated classes who should give tone and character to the thoughts and opinions of the whole people.

§ 7. While thus strongly recommending the study of law as a part of the regular curriculum in our colleges, I am by no means of the opinion that the student's time should be occupied with much of detail and minutiæ. He needs generalizations, the animating principles, rather than the special rules by which the principles have been made applicable to particular cases. He should be led to catch the bold outlines, the historical sources and epochs, and the ethical elements, all of which in combination produce the strong framework of the science.

§ 8. Invaluable as are many general treatises of municipal law, and especially the Commentaries of Sir William Blackstone, and those of Chancellor Kent, they are completely unfitted as introductions to the study of jurisprudence as a part of a liberal education. These works are admirable for professional students, but by their very detail and comprehensiveness, they become confused and burdensome to general students. There is also a special defect in these treatises, and particularly in that of Judge Blackstone, in that they give no account of the Roman law, other than in occasional and incidental allusions, and are entirely deficient in what may properly be called comparative law. It may not be of much practical importance to the busy lawyer, to know how the same living seeds of principles have developed into the jurisprudence of England and into that of France; to investigate the various influences which have

exerted their power in these two countries in diverting their once common stream of the municipal law; but these are the very classes of questions which are of the highest interest and importance to the perfection of a general culture. The advocate would hardly stop in his labors in the courts, to trace the gradual development of the Roman jurisprudence, and to compare that growth in its elements and methods with the history of the common law of England; his sphere lies in the present, his duties are more practical; but this is the very knowledge which the wise citizen demands, who must some day and in some manner act his part in forming and administering the laws of his State.

§ 9. This work is intended as a contribution toward supplying the deficiency which I am sure has been felt by all instructors. Its aim is to explore somewhat, though not in an antiquarian spirit, the sources of the law of England and America; to disclose the salient points of contact between jurisprudence and history; to bring out into relief the vital and organizing principles of the system, and to suggest some comparisons between the methods and results of different national legislations.

§ 10. The municipal law, as actually administered in Europe and America, is composed of ethics and history. It is impossible to neglect either of these elements in any general outline of the jurisprudence of a single nation, or in a comparative view of the systems of different countries.

§ 11. No code of laws could be endured by any civilized people, unless it were infused with the spirit of justice, a regard to the immutable distinctions between right and wrong. In order to command the confidence and willing obedience of the citizen, the supreme power of the state must assure him that he will be guarded, encouraged, and rewarded in doing his duty, in following the dictates of his conscience, and that the wicked, the disorganizers of society, will be punished for their offences. As the law professes to interfere between individuals in all of their mutual rela-

tions, and to dictate to them the relations which they shall bear to the state, it must provide that all of this intercourse shall be regulated by the principles of right; that contracts once entered into shall be equitably enforced; that property shall be retained in the hands of its owners; that personal freedom shall be ensured; that crimes shall be punished.

§ 12. As a nation advances in civilization, and laws are developed from their first simple and perhaps rude forms, we uniformly find that they assume more and more the shape of pure ethical maxims. The original arbitrariness, the once complete nationalism, are gradually softened, and those innate principles of natural justice common to all times and peoples, which the Romans called *jus gentium*, have freer play. Equity displaces force; right supplants might; fewer instances of hardship and injustice occur in the actual working of the system; more frequent references are made to all-pervading and fruitful principles; homogeneity and completeness are evolved out from the fragmentary and confused.

§ 13. No system or code of laws, however, claims to be in exact agreement with the teachings of abstract right and natural justice. While legislation would be unsupportable by any free and Christian people, which should impose upon the citizen the legal obligation of doing what was clearly against conscience and duty, and the voice of God, speaking through the common sentiments of mankind, we everywhere meet with provisions forbidding what would otherwise be innocent and even praiseworthy; rendering, in short, illegal, acts which were before not only harmless, but were in strict harmony with the law of nature and with Christian morals. Thus, it must be conceded that the natural right to own landed and personal property, implies the right to buy and dispose of it freely, and even to transmit it after death by will; and it would seem that the natural course for property of all kinds to take after the decease of the owner, is to be equally divided among his children.

There is hardly any system of municipal law which does not, to a greater or less degree, interfere with these natural rights, and break in upon this natural order. With some, restrictions are placed upon the acquirement, with others, upon the sale of lands and chattels. With some, land descends wholly to the first born, to the exclusion of all other children; with others, sons are preferred to daughters in the inheritance. With some, the right of disposing by will was taken away, and by all it is regulated by strict and precise rules, while certain dispositions are absolutely forbidden. The principles of abstract right would hardly draw any distinction between property in lands and that in movables; yet almost all modern codes impress upon these species of possessions a difference broad and deep.

§ 14. Thus the maxims of justice and pure right which enter into every system of municipal legislation, are and must be modified by the influence of the past, by the national history and institutions, by the manners, customs, and religions, in short, by the ethnic life of the people. The study of the law of to-day is inseparably blended with the traditions of the former times. It is in them we shall find the sources of those peculiar national characteristics which distinguish the jurisprudence of each country from that of all other states. Whatever of any code is based upon natural right, will be common to it and to all others; whatever in each is peculiar, will generally be found to have its roots in the tribal institutions, and to have been developed and modified by the progress of the community in social order and culture.

§ 15. In our study of law we shall have much to do, then, with history. This, however, will not be the outside history, the record of shifting dynasties, of wars and battles, of political intrigues and ambitious projects; it will rather be an examination of the causes which produced all these movements on the surface—the life of the races, the planting, struggling growth, and final flowering and fruitage of

the seeds of institutions—those causes which at once precede, accompany, and follow, an advancing civilization. Such a history is not one of dates and events, but of principles; not of the outward form, but of the animating spirit.

§ 16. Municipal law is that of a particular state. It is distinguished from the natural law, which, without the interposition of any national authority, but from the very nature of the relations of mankind to each other and to God, applies equally to all people, and directs its commands to all persons. It is also contrasted with those rules which are acknowledged by different countries to be founded in justice or expediency, and serve in some measure to regulate the mutual intercourse of states, and are in modern times called the law of nations. Among the Romans, the body of laws which governed the Roman commonwealth, which were peculiar to it, which distinguished it from other people, was called the civil law, *lex civilis*, or law applicable to the citizen. They acknowledged other rules, however, which they termed the *jus gentium*, law of nations, because its precepts were common to and binding upon all peoples and through all times, and were based, therefore, upon principles of abstract right and obligation. Our use of the term municipal law is not exactly synonymous with the *lex civilis* of the Romans; the latter was more restricted in its meaning. The pure and simple *lex civilis* of the Romans in the progress of time became greatly enlarged, and enriched by additions drawn from the never failing fountains of the *jus gentium*, and the whole, blended into a homogeneous mass, was the law of the Roman state. Thus the laws of England, of America, or of France, drawing their principles from many of the same sources, preserving many elements in common, acknowledging the claims of natural right and justice, and still differenced by many civil peculiarities, are each a municipal law, having no authority beyond the bounds of their separate dominions.

§ 17. Sir William Blackstone defines municipal law to

be, "A rule of civil conduct prescribed by the supreme power in the state, commanding what is right, and prohibiting what is wrong." This definition has been successfully criticized, as being either tautological or incorrect. I shall define municipal law to be, The body of rules by which the supreme power in a state is guided in its governing action. The theory of the construction or creation of these rules is the science of legislation. The science of jurisprudence is conversant with their interpretation and application.

§ 18. The rules which compose the municipal law are susceptible of numerous divisions and classifications, which greatly facilitate their study, the tracing their origin, history, and relations. The first divisions which I shall mention have reference to their subject matter, and may be stated as,

§ 19. I. Political.—The rules embraced in this class relate to the constitution of the governing machinery of the state, and the internal organization of the public body. They include the written constitutions of the American commonwealths, and the traditional organic law of England; they prescribe the character, number, powers, and duties of rulers, the composition of legislatures and parliaments, the jurisdiction of courts, the divisions into counties, towns, and municipalities, the creation of local magistrates, the construction of roads and bridges, the appointment or election of officers, and the thousand other ways in which the state interferes to control the action of citizens in matters which have direct reference to the nation and to the public good.

§ 20. In America this division of the municipal law is almost entirely made up of the State and Federal Constitutions, and the statutes of the State and Federal Legislatures. In England a great part of it is traditional, or has only received its authoritative character through the decisions of courts. Except so far as it affects the private rights of

the citizen, and the organization and powers of courts, this work will have little to do with political law.

§ 21. II. PRIVATE.—This division embraces the great body of the municipal law regulating the rights and duties of individuals among each other and toward the state. It furnishes by far the largest part of the questions presented for judicial decision in determining the disputes of litigant parties. While the public or political law is generally fixed, certain, and sharply defined, touching upon a comparatively few particulars, the private law is progressive, sometimes not clearly announced, ramified into a multitude of subdivisions, to meet the ever-changing complications which are constantly arising in the busy life of the present.

§ 22. The private law may again be divided, having reference to its subject matter, into

1. *The Civil Law*, which includes those rules that prescribe and control the rights, duties, and actions of the citizens among each other, which regulate property, and determine the status of individuals; and,

§ 23. 2. *The Criminal Law*, which is confined to the defining of crimes, the ascertaining of criminals, and the apportionment and infliction of punishments.

The term civil law is here used in its popular sense, as generally employed in this connection by English and American legal writers, and not in its more technical signification, as the law of a state.

§ 24. The civil law may again be separated into three subdivisions:

1. Those rules which relate to the general rights and obligations inherent in all persons, as members of the body politic;

2. Those rules which define the condition and status of particular classes of persons, and the rights and duties incident upon such peculiar status; and

3. Those rules which regulate property, and determine the rights and duties of owners.

§ 25. The law of property following a simple and evident line of demarkation, is again classified into two groups:

1. That which refers to movables, including the law of personal contracts, commercial and maritime law, and the rules of succession to goods and chattels; and

2. That which relates to immovables, or lands.

§ 26. The municipal law of England and America, resembling in this particular that of every civilized country of Europe, may be classified according to its several national origins. As has already been said, our jurisprudence is composite, and its roots are to be traced through many mutations of empires and peoples, back into a remote past, where the first germs are rather to be suspected than certainly ascertained. Still, when we leave the vague confines of a time and people which had no literature to preserve a definite record of passing events, where we must rather argue the existence of institutions and customs from their plain presence in subsequent generations,—when we leave these regions of mere tradition, and come down into the realms of definite history, we shall soon discover the evident traces of many of the legal rules which govern and compel our actions in the present day.

§ 27. No modern European nation is composed of a single race, and least of all are the English. Celt, Saxon, Dane, and Norman have all contributed their elements to form the English nationality, and with the separate streams of blood flowing in one course of descent through the pulses of the English heart, they have added their diverse customs and institutions to be amalgamated into the English municipal law. And through all of this mass, the Roman jurisprudence has penetrated, and infused its wonderful vitality and power. The study of these various elements will give us the history of the law.

§ 28. We shall then divide the municipal law, having reference to nationality, and the sources whence it has been

derived, and the history of its gradual progress and development, into several classes.

I. THE SAXON, GERMANIC, AND OTHER TRIBAL CUSTOMS. —The long and virtually uninterrupted sway of the Saxons in England, and the fact that they have contributed the groundwork of our language, the grammatical form into which it is cast, and most of the words in common use, would lead us to suppose that to them we are to look for the origin of much of our legal maxims and principles. A cursory examination even, of the history of English jurisprudence will not disappoint this expectation. Many of the most cherished and carefully guarded portions of our law are drawn from a Saxon source. This is especially true of those fundamental or constitutional provisions which protect the citizen in the exercise of his personal rights, which defend individual liberty against the encroachments of power, which, in their natural development, have had the effect to render England and America free commonwealths.

The traces of the customs of the aboriginal inhabitants of Britain before they were subdued by the Romans, or were again conquered by the Saxons, and of the Danish rule, will be found much more vague and uncertain.

§ 29. II. THE FEUDAL SYSTEM.—The Germanic invasions into Gaul, Spain, and Italy, left a vast deposit of institutions which have strongly marked the national laws of Europe to the present day. Among these the most important and the most lasting was the feudal system. Strengthened in Britain by the invasion of the Normans, it became the very foundation of the English law of landed property, and of social classes and divisions. It has transmitted its evident effects into the familiar rules of our own times, and no portion of legal history will be found more interesting and more instructive to the student than that of the Feud.

§ 30. III. THE MARITIME CODES OF THE MIDDLE AGES. —Neither the ancient Saxons, nor the feudal lawgivers, made any provision for the wants of commerce and trade. During the Middle Ages, however, certain free maritime cities grew into importance and power; their commerce became extended, and the demand for laws regulating it resulted in the compilation of several local codes. As commerce and trade are cosmopolitan, and as these collections of laws were recommended by their adherence to the maxims of equity, they were very generally adopted into the jurisprudence of other countries, where the increasing extent of intercommunication and traffic seemed to require some such addition to the several national systems. In this common origin we may find one of the causes for the marked general resemblance between those portions of the municipal law of different civilized states which specially regulate maritime and commercial subjects.

§ 31. IV. THE ROMAN JURISPRUDENCE.—It is an established fact that the Roman element in the laws of modern European states of the continent is preponderating. English writers have been slow to perceive or to concede that to the same source is referable a very great part of their own municipal law. Through several channels have the streams from the imperial reservoir poured their contributions to enrich the legal resources of the once province of Britain. During the three hundred and fifty years after the Roman dominion was established over the Northern island, until it was overthrown, the local language and laws had, in a great measure, given place to those of their conquerors. This was according to the universal practice of the Roman government, and although the change was not by far so complete as in the provinces of Gaul and Spain, yet it was sufficiently thorough and continued for such a time as to render the effects uneffaceable.

§ 32. Subsequently, when the Saxon rule had swept

away all outward traces of the Imperial policy, and when the Normans had in turn introduced the strict law of feuds, the ecclesiastics, then possessing, all over Europe, the learning as well in jurisprudence, medicine, and the liberal arts, as in theology, assumed an active share in the administration of justice, and were, to a great extent, guided by those compilations which, made under the direction of the Emperor Justinian, summed up all former Roman legislation. Bracton, one of the oldest of English legal text writers, who flourished in the beginning of the thirteenth century, shows a familiarity with the Roman law, and does not hesitate to quote largely from its authorities, as though it were the law of England.

§ 33. At a much later period the judges of English courts have not been slow to avail themselves of the enlightened and philosophical investigations of the Roman jurists, and to borrow freely from them to supply, as new cases and circumstances were continually arising, the omissions of the old common law.

We shall find no subject in the course of our studies more interesting than the history of the Roman law, as it has been preserved through the Middle Ages, under the overwhelming weight of the feudal system, and as it has gradually extended its influence and asserted its supremacy, until it has come to be an acknowledged element in the jurisprudence of England, and has, to a yet greater degree, moulded that of America.

§ 34. V. The Demands of a gradually progressive Civilization.—I have added this division, not because it is strictly a national source, for it is common to the enlightened jurisprudence of all states, but because to it England and America and every country owe the addition of by far the greater portion of the familiar legal rules of their existing municipal systems. This demand, answering to new complications of business and struggles of enterprise, to

new relations of society, is continually extending old principles, discovering fresh analogies, borrowing from other national codes, and inventing additional regulations. Its operations and effects are not peculiar to England and America; they built up the vast jurisprudence of Rome upon the rude foundation stones of the laws of the Decemvirs; they have in the same manner constructed, upon bases more or less broad and deep, the legal systems of every European state.

§ 35. The municipal law of England and of each of the American States is susceptible of another most important division having reference to its manner of promulgation, to the methods by and through which it becomes an authoritative rule, compelling the obedience of the subject. This classification, to which I am about to refer, is not peculiar to England and to America, it is to be found in the jurisprudence of all European states which have made any advance in civilization, and was strongly marked in the growth of the law of Rome. A careful examination of the history of all nations which have progressed from comparative barbarism to a condition of high culture, will disclose a general resemblance in the forms by which this progress has been made evident in the law, through its development from rudeness and simplicity to refinement and comprehensiveness.

The two grand divisions of form are,

§ 36. 1. The Statute Law, including the acts of Parliament and legislatures in England and America, and the decrees of kings and emperors in those countries where the legislative and executive departments are united in one person. Whenever the legislature has spoken, in general its voice is supreme; it overrides the declarations of preceding legislatures, and the decisions of courts. In America the legislative functions are controlled by the provisions of the Federal and State Constitutions; which are themselves

only statutes of a more solemn and enduring nature. In England, Parliament can act upon any subject; in the United States, the National Congress can only exercise such powers as are directly conferred upon it, or as are necessarily implied by the letter of the organic law, while, on the other hand, the State Legislatures, therein resembling the English Parliament, possess whatever authority is not forbidden to them by the Federal or local Constitutions. Without doubt, the Parliament of Great Britain, and the Legislatures of all or most of the several States of the Union, could abolish all other forms of the municipal law, and embody the whole in one comprehensive statutory code. The functions of the courts in enlarging legal principles, and adding to legal dogmas might be taken away, and they might be restricted to the simple office of applying the fixed provisions of a statute in deciding the controversies brought before them. This has been attempted in some countries, and with what success we shall see in the course of our inquiries.

§ 37. II. The Unwritten Law.—The term "unwritten" is not happily chosen, but it has grown into common use with English and American writers, and, although not expressive, serves to designate the class. This form of a national jurisprudence includes all that is not enacted by the legislative will into the shape of statutes. Within it are to be found most of the scientific unfoldings of principle and of gradual development through the progress of the national civilization. In England and America it comprehends the great body of the private civil maxims and regulations, and in England much that is political. It has sometimes been called customary law, as though it had its origin and vitality in long prevailing general customs of the realm. This supposition is not strictly true. When we go back to the earliest periods of the nation's existence, we shall find in the tribal customs the seeds, the germinating powers of many

legal principles; but as the ages pass by, these customs are lost, society changes its outward forms, new interests arise, new demands are made upon the law. To meet these incessant demands, the law must continually add to its former resources; the questions of to-day must be resolved by analogies drawn from the cases of yesterday; from the seeds of the old, the ever-ripening fruit of the present is produced. Thus is the unwritten law called into being.

§ 38. In England and most of the United States, the term common law is used to designate so much of this unwritten spontaneous growth as has not been altered by statutes, or modified by the additions and changes of modern decisions. Sir William Blackstone and many other writers, both English and American, speak of it as a system or code always existing, not now or at any other time within the limits of human memory and historical research invented, or enacted, but only from time to time stated, brought into active use, and practically enforced by the courts. This is certainly conveying a very false idea of the law; it is treating a figure of speech as though it were history. The common law of England is not now, and never was, and never will be a complete system, existing partly in actual precepts, and partly in an undefined or cloudy state, ready to have the curtain rolled back and the law discovered by judicial action; it is rather a power continually reproducing itself, taking up fresh material, and converting it into new regulations, new maxims, new applications, in short, a new code. The unwritten law, thus builded up without the aid of statutes, is not peculiar to England and countries deriving their institutions through British descent. We shall discover that the jurisprudence of Rome was evolved in a similar manner, that the legislating judges of England and America had their counterparts in the Roman tribunals.

§ 39. This phase of the law in England and the United States receives its authoritative sanction only in the decisions of courts. Learned jurists and text writers may

discuss principles, compare analogies, draw conclusions which are recommended by their equity to the judgment of all good citizens; these opinions may have the greatest weight in influencing the minds of judges, they may be so convincing as to leave no reasonable doubt of their truth, they may be acted upon for a long period of time as guides in the operations of business, but it is not until a competent court has put its seal of approval upon them, that they rise from the condition of mere speculations, and become endowed with life as the supreme law of the land. When thus declared, and I may say with truth, when thus enacted, the unwritten law has all the binding force and efficacy of the most solemn statute. Its only badge of inferiority is, that the legislature may step in and sweep it all away, and when its potent voice has once spoken, the courts are powerless to resist; they can only expound the statute. Most English and American writers use the term "common law" in a restricted technical sense, as meaning that portion of the municipal law which is distinguished from equity and admiralty law. I have employed it in a more enlarged and comprehensive sense, regarding these divisions, not as in any extent antagonistic, but as forming essential parts of one grand whole, the unwritten jurisprudence of the state.

§ 40. The courts, which are those portions of the political machinery of the nation, through which this form of legislation finds its utterance, may be divided into four generic classes, whether there be separate tribunals allotted to each class, or whether one and the same court has jurisdiction over the matters embraced in all. These courts are:

1. The Common Law, or "Law" Courts.
2. The Equity Courts.
3. The Ecclesiastical Courts; and
4. The Admiralty Courts.

It is not my purpose in this introductory chapter to give any complete statement of the distinguishing features and

judicial functions of these several tribunals, but only to state in a few words the peculiar province of each, reserving the more full description to a subsequent portion of the work.

§ 41. 1. *The Common Law Courts* had cognizance of such questions as were decided by the rules of the technical common law. In them the determining power was confided to two entirely distinct bodies—the jury whose province it was solely to decide the disputed facts, and the judges who enunciated the law, either by applying well-known and established principles to the circumstances of the case, or by actually, though not often avowedly, enacting new rules. Thus a judgment is reached by the joint action of these agencies. In quite recent times, through the intervention of statutes, both in England and America, this dual character of the common law courts has been to some extent broken in upon, and the judges have been invested with the power in numerous instances of deciding the facts as well as determining the law.

§ 42. From the very constitution of these courts, the forms of remedy by which they proceeded were necessarily simple; the decisions of a jury must be a yea, yea, or a nay, nay. So, with a very few exceptions, the relief sought by a litigant party was in the shape of pecuniary damages. He complained that his adversary had trespassed upon his lands, had wrongfully taken and carried away his property, had used violence to his person, had traduced his character, had broken a contract, had refused to pay an indebtedness, or had infringed upon his legal rights in a thousand various ways, and he asked as a satisfaction for such injuries, that the courts should adjudge the offender to pay him a suitable amount of money. It was the office of the jury to decide whether these charges were true, and if so, how great a sum would be a compensation; it was the duty of the judge to declare whether the acts done by the defendant amounted

to a breach of the law, and gave the plaintiff a legal claim upon him for reparation. Without going with any particularity into the exceptions to this general form of remedy, it is sufficient to say that the principal ones were to be found in those cases where the moving party demanded judicial aid to restore him to the possession of certain specific chattels or of certain definite lands.

The same class of courts has also the exclusive power of trying most persons charged with crimes and offences against the state.

§ 43. 2. *Courts of Equity.*—The jurisdiction of these tribunals was for a long period of time in England exercised by a high officer of the realm, called the chancellor, but many other judges have since been clothed with the same functions. It is evident that the constitution and forms of remedy of the "law" courts absolutely forbade them to entertain a vast number of questions which must be decided by rules inapplicable to the sharply-defined decisions of a jury. A system of municipal law would miserably fail of its primary object in affording exact justice, if it neglected to enforce rights and duties which were not comprehended in mere pecuniary mulcts, or the delivery of the possession of chattels and lands. These rights and duties, and the provisions of the law regulating them, are called equity, and the tribunals in which they are enforced are equity courts. They dispense with the jury, and commit the consideration of fact and law to the judge who constitutes the court. He is able to pronounce a judgment which shall allot different rights and obligations to different suitors; he can enforce remedies utterly beyond the capacity of a jury. Yet the rules by which he is guided are as much a part of the municipal law of the state, as those which control the action of any other tribunals; they only touch upon subjects above and beyond the reach of "law" courts.

§ 44. 3. *The Ecclesiastical Courts.*—These were of a very ancient origin. They were the diocesan tribunals of

the bishops for trying matters directly connected with the church, and thence came to acquire jurisdiction over other questions which were considered as having an intimate concern with a man's spiritual welfare, or which, in their forcible language, affected "the soul's health." So, besides their power to determine cases arising in purely ecclesiastical law, they have cognizance of the probate of wills, of the settlement of the personal estates of the dead, and, until a late English statute, of granting limited divorces, and hearing other matrimonial causes. In this country no civil tribunals possess any ecclesiastical jurisdiction. In many of the States there are surrogate courts, or probate courts, which perform the functions of the English ecclesiastical courts in the settlement of successions.

§ 45. 4. *The Admiralty Courts* have to do with certain classes of questions and subjects arising upon the high seas.

In neither of the two latter classes is the intervention of a jury required. The judges decide the disputed facts and apply to them the law.

§ 46. In this country the supreme court of the United States, and its subordinate branches, the circuit and district courts, have jurisdiction of cases at law, in equity, and in admiralty, but can entertain none of the questions which belong to the ecclesiastical courts of England. In the several States there is hardly any uniformity in the composition of the general tribunals, or the distribution of their powers. In some, the law and equity branches are distinct; in most, however, both classes of judicial duties are confided to the same judges. All admiralty jurisdiction is taken away from the State courts, by the National Constitution.

§ 47. It is through the action of these classes of courts, continued through generations and centuries, considering all the questions which can be evolved out of the contentions, the conflicting interests and entangled relations of society, that the body of the unwritten law has been built up by gradual accretions, each new addition firmly ce-

mented to what has been laid before, and the whole closely knit together by analogies and common principles, running through and through like the ties and braces of a vast framework.

§ 48. I may appropriately close this general outline by a short statement of some of the peculiar advantages and faults which belong to both of the two grand divisions of our national jurisprudence.

1. The statute has this advantage, that it only acts prospectively, or from the time of its enactment. It does not relate back, and, by its change of existing rules, overthrow and sweep away rights which had become vested under the operation of former regulations.

2. The statute law has the further advantage of being generally plain, distinct, and certain. It leaves no doubt as to the citizen's rights and duties, which are the particular subjects of its provisions; there is no room for argument and discussion, keeping a question open until it has been passed upon by some competent tribunal. I say this is generally the case, but perhaps I have rather described an ideal code of legislative enactments—have rather represented the point to which statutes might be brought, than the actual state of the law resulting from them. For it is certainly true, that from a carelessness in drawing statutes, from inaccuracy of expression, and, above all, from neglect in considering and providing for their related consequences, there is often great room for question, and an absolute necessity for judicial construction to determine their meaning.

§ 49. 3. On the other hand, and this is an evil of the greatest magnitude inherent in the system, the statute law is rigid, inflexible, unprogressive, incapable of adapting itself to new circumstances and new cases. It cannot be modified and bent by judicial construction so as to meet the requirements of peculiar circumstances, to prevent injustice and to maintain equity. It does not smoothly and steadily glide in and adapt itself to the whole body of the

law, but thrusts itself in rudely and uncompromisingly, producing effects unseen at the first, and, perhaps, causing evils greater than those it was intended to remedy.

§ 50. In the unwritten law we shall find corresponding advantages and faults.

1. It is retrospective in its action. The decisions of a court of authority sufficient to alter or establish the law, reach back as well as forward, and affect events, titles, and property considered long passed or settled. The particular rule under consideration is not only changed from that time forward, but it is deemed to have been in accordance with the new doctrine through time passed. Thus the rights of property might be seriously disturbed, and what was once sure become again uncertain. This is not a statement of what does often take place, but of what may always possibly happen.

§ 51. 2. The great distinguishing feature of the unwritten law, thus announced by the authoritative decisions of courts, the feature which is an advantage so preëminent that it is always found as a portion of every municipal system of law, and which gives the English and American jurisprudence its rare value, is that it is elastic, flexible, progressive, self-developing, accommodating itself to the change of circumstances, growing with the growth and ever keeping pace with the progress of society in culture and refinement. It is thus at once a cause and effect of civilization, encouraging new advances of the people, and in turn receiving a fresh impetus from them. It is not stern and inflexible, like the statutory code, but can be bent and moulded to meet the constant succession of new cases and fresh complications. Thus, while pursuing definite principles and rules, it need not arbitrarily interfere, but, guided by reason and expediency, it can constantly prevent injustice, and promote good order and prosperity.

§ 52. The former of these peculiarities requires that the unwritten law should be based on and should closely follow

precedents or former decisions, or otherwise there could be no stability or security in the tenures of property and the rights of owners. When a legal doctrine has once been fairly considered and settled by the judgment of a superior court, it should not be carelessly reversed, and a different rule adopted, even though it be conceded that the original decision was wrong, and that the law would be better were it otherwise. It is a lesser evil to endure the effects of a rule not quite consonant with the greatest convenience, or even with the purest morals or most impartial justice, than to shake confidence in the stability of the legal system by reckless tearing down and rebuilding.

§ 53. The municipal law of England and America, so far as it is the offspring of judicial decision, has constantly adhered to this salutary rule. Prior cases, involving the same questions, or suggesting analogies near or remote, are continually cited and deferred to by the courts. The precedents are the anchors which hold the national jurisprudence firmly in its place, and prevent it from being swept away by the force of caprice or mere theory.

§ 54. On the other hand, the second peculiarity requires that this adhesion to precedents should not be blind and slavish, but that the bands which secure the law to the past, should, as occasion demands, be gradually loosened and cast off. Thus the elements of stability and elasticity, of fixedness and progressive development, of certainty and comprehensiveness are effectually and beautifully preserved. It is with the law as with language, the past gives the plastic form, the present supplies the new material. We can discern no epoch at which an abrupt change has been made, but we know that a continued modification is going on, amounting, when we compare distant periods of time, to a revolution.

§ 55. Having thus in this introductory chapter given an outline of the divisions of the subject and the matters to be considered, I shall now proceed to treat more at large upon

the topics thus suggested. In the course of this examination, following the classification already made, the work will be divided into three parts.

*Part First* will treat of the municipal law in its modal character, the judicial machinery through which it has been developed, and the manner and form of this evolution.

*Part Second* will contain a historical sketch of the national sources of English and American law; and

*Part Third* will be devoted to a consideration of the subject matter of our jurisprudence, and will endeavor to exhibit the general principles, rather than to explain in detail the separate rules.

# PART I.

## THE LAW IN ITS MODAL CHARACTER: ITS MEANS, METHODS, AND FORMS OF DEVELOPMENT.

## CHAPTER I.

### STATUTES.

§ 56. THERE are certain forms, methods, and instruments which are common to the legislation of all those nations in which society has made any considerable progress in civilization, with organized governments, definite policy, and a coherent system of municipal regulations. Of course we do not refer to those countries where justice is administered according to the mere caprice of any official, in which the law, depending upon the uncontrolled will of a single despot, or of a tumultuous democracy, is ever fluctuating and contradictory. Our attention will be directed, among the ancients, principally to Rome, and among the moderns will be confined to those countries of Europe which, succeeding the crumbling Western Empire, have been marked by a striking similarity in their civilization, in their forms of legal development, and in the point to which they have arrived in social progress. In all these countries, different as they are in many external features, with peoples speaking various languages and wedded to various customs, we shall discover common principles of

civilization continually at work, sometimes one, sometimes the other preponderating. In all, the rulers and the people, whatever may be the local form of government or maxims of state policy, are alike subject to the power of a controlling law. In none shall we find a despotic monarch, a representative legislature, or a turbulent democracy who do not profess to follow the leadings, and carry out the principles of the general laws of the nation. There may have been temporary interruptions to this subjection of the ruling class to the demands of an admitted higher power; there may have been tyrants who occasionally have asserted the absolute supremacy of their own unbridled will, but these instances only serve to bring out the general rule in stronger relief.

§ 57. While this universal obedience to general legal principles is evident, pervading all the nations of modern Europe which we have embraced within our survey, we shall at the same time perceive in all of those separate communities, that the original germs, the partly grown or fully expanded results have been developed, nurtured, and attained through the working of the same elements, by means of the same political machinery. The resemblance may sometimes be hidden under seeming outward differences, but a closer scrutiny will detect the general identity.

§ 58. I would by no means assert that, in the various countries of Europe, and in the States of America, these elements and means have all done an equal work, and produced a correspondingly similar result. In one nation the principle of absolutism is in the ascendant; the popular will is little consulted; representative assemblies are almost unknown, or are restricted to unimportant duties; in it the element of a free liberal judiciary, working out the national legislation in an open expansive form, has less scope, and the jurisprudence, emanating to a great extent from the regulated will of a permanent class of rulers, assumes rather the form of statutes. In another state, the germs of indi-

vidual liberty, planted deep in the rich soil of the people's ethnic life, bursting through all the opposition of counter forces, have been brought out as powers in the commonwealth, not only through the political machinery of a limited monarchy and representative legislatures, but even more still in enlightened and liberal courts, through whose action the jurisprudence has assumed rather the form of an expanding, progressive, self-contained, unwritten law.

§ 59. Whichever form may predominate, the municipal legislation of all countries, which, with a true national life animating them, have entered upon the onward march of a real civilization, divides itself into the two grand classes of statute, and unwritten law, or the law of definite enactment, and the law of virtual judicial decision. If we reflect upon the familiar rules which control our civil conduct, we cannot perceive any one which does not fall within one of these divisions. Our form of municipal society is so similar to that of England, that we can easily admit the same to be true of that country. If we go back to Rome, the great mother of law, we shall still find the statute on the one hand, and the judicial decision, or its equivalent, on the other, to comprehend all the forms and means of legal development.

§ 60. Statutes are brought forth into being by different agencies, and assume various forms. Both their immediate sources, and the resulting forms may be generally classified into a few comprehensive divisions which are common to many nations, and to different stages of civilization.

§ 61. The sources from which the statute has originated, or been enacted into its condition of binding municipal law, in the countries and during the periods of time which we have before mentioned as included in our review, are

1. General assemblies of the citizens of a state, or partial convocations of a particular portion or class of individuals, who meet to propose and adopt laws of universal or limited sanction.

2. Representative and deliberative assemblies, either elective or hereditary, convened on special occasions, or holding stated and regular sessions as a part of the political machinery of the commonwealth; and

3. The kings, emperors, or other executive heads of the government, who, by the constitution of the municipal society, have the authority to promulgate laws.

I will illustrate these classes by a few instances taken from the legislation of ancient and modern times.

§ 62. At the present day, at least in Europe and America, the first of these methods of calling the law into being, is almost entirely disused. Neither in England nor in America, with perhaps a single exception, is there any provision made by the organic law for the people of the whole country, or of any portion or class of it, to meet together in their primary capacities, and pass statutes binding upon the whole nation or upon any number of its citizens. The inhabitants of towns and cities no longer assemble at the sound of the great bell, and, in tumultuous gatherings, order the affairs of the community. Public assemblies there are, which deliberate and decide upon measures of state or local policy, and which, indeed, often exert a great and sometimes overwhelming influence upon the final settlement of debated subjects, but these are only methods of bringing the force of public opinion to bear upon the constituted authorities; they can recommend, but cannot legislate. The only approximation to these primary legislative assemblies in this country is found in the provision which exists in some States of America, for the inhabitants of each township to meet and regulate the internal affairs of their small communities. But the results of these town meetings cannot truly be called laws or statutes. Upon one special subject, however, the people of the American States have retained the power of legislation in their own hands. They are often called to decide in their collective capacity upon the acceptance or rejection of the written constitutions

which are submitted to them by duly organized conventions for their approval. As these instruments contain the organic law of a commonwealth, upon which all the forms of government are built up, the people have been jealous of a delegated power in imposing upon them such an all important enactment, and have claimed the right to decide for themselves the momentous question. In this they have retained much of the form, and all of the substance of the Roman people's vote upon the proposed decrees of the Senate.

§ 63. The practice of committing the functions of legislation to general conventions of the citizens was much in vogue as a method of state policy in ancient times, when civilization assumed more the form of communities aggregated in cities, than thinly distributed over a wide territory. M. Guizot pronounces this to be the type of Roman civilization. The same was true of Greece and of many other nations which, before the Middle Ages, attained to any degree of culture. It was the city which contained the ruling populace, and gave laws to the rest of the country. It was possible in such a society for the whole body of citizens to meet in regularly constituted assemblies, and with some concert of action pronounce upon public measures. As the city diminished in power, and finally lost its supremacy, by the spread of population through the rural regions and villages, and as this population arose in dignity and began to assume its proper position, the convocation of the mass of the people to deliberate and enact or reject laws became impossible.

§ 64. By the Roman constitution, from the earliest periods of authentic history down to the establishment of the imperial power, the voice of the people was a potent instrument in enacting the statutory law of the commonwealth. The various meetings of the several orders of the inhabitants, convened in their class or general assemblies, the *comitia curiata* of the burghers, the *comitia tributa* of the

commons or plebeians, and the *comitia centuriata* or assemblages of the centuries, had each the power and authority to originate, affirm, or reject laws which should be binding upon the whole state, or upon the particular portion represented by the convention. The acts of the assemblies of the curies and of the centuries obtained the technical name of Leges, those of the commons were known as Plebiscites. They formed a part of the written law of Rome, analogous to our statutes, and were supreme over the courts and magistrates.

At the destruction of the Western Empire, Rome left the city as a type of power scattered through her provinces, and although the influence of these communities was much diminished, and, indeed, in a great measure destroyed by the rising feudal civilization, there still remained some important municipalities which preserved the old form of the direct rule of the burghers down to a late period of European history.

§ 65. The second class of agencies for producing statutes, the representative assemblies, either elective or hereditary, is common to all stages of civilization, as well to the rude barbarian as to the most cultivated state of modern Europe and America. In some times and countries, it has appeared in connection both with the democratic and kingly elements of power; in others with the kingly authority alone; and in still others, it is the only source of the written law.

§ 66. In Rome this body was the Senate, and, for several centuries during the period of its integrity, consisted of three hundred delegates elected from the gentes or houses, into which the three original tribes of Burghers were divided, each house sending one representative from among its heads of families. It must not be supposed that the functions of the Roman Senate were exactly analogous to those of the English Parliament or American Legislatures. Its decrees were not absolute and final, requiring no

additional sanction, although this illustrious body was, for a long period of time, the grand source of statutory legislation. In it propositions were made, discussed, shaped and passed into decrees, but they still needed, during the earlier periods of the elective kings, and afterward, during the republic, the final ratification of the assemblies of the curies and commons, to enact them into Leges, or laws in the full acceptation of the term.

§ 67. Without adverting to the many forms of national legislatures which have existed, and still continue to exist in Europe, although the subject would be full of interest, but beyond the scope of a merely elementary work, and reserving to a subsequent portion of this book the description of the manner in which, in all feudal countries, the king gradually drew around him a body of hereditary or representative advisers, it is sufficient to allude to the English Parliament as at present established, as a type of the state central or imperial legislature, whose acts have supreme authority, and whose functions therefore transcend in importance those of any other department of the government.

§ 68. The Roman Senate, and many other elective or hereditary national assemblies, consisted of one body meeting, deliberating and voting together. The British Parliament and the legislatures of this country, fashioned after its model, are distinguished by being separated into two independent co-equal houses, whose consent must be obtained for the purposes of ordinary legislation. Wherever this dual character appears, we shall find that one house is intended as the correlative of the other; that one is more conservative, the other more popular; that one is designed in a measure to represent the general interests of the empire, the other, the more particular interests of local constituencies. These aims and purposes are accomplished in various ways. In England, the House of Lords is composed mostly of hereditary members, although there is an element

of appointed bishops, who hold their offices for life. In America the same idea of permanency and freedom from the passing influence of popular pressure is embodied in the method of appointment of the United States Senators, for terms of a considerable length, by the State Legislatures, and among the individual commonwealths, in the method of electing the State Senators from larger constituencies, and for longer times than belong to the members of the lower houses. In Great Britain the delegates to the coördinate body, or the House of Commons, are strictly elective from local districts or boroughs. In America the same method is pursued in the choice of representatives to the lower house of the Federal Congress, and to the popular branches of the State Legislatures. It is plain then, that, due allowance being made for the great differences in our social organization, in our class divisions, and in our adherence to the past with a steady conservatism, the legislative assemblies of our own country are closely patterned after the model furnished them by the British Parliament. The American senator has not the inherited elevation in the social order of the English Noble, but in his capacity of law maker, he represents the same interests, and performs the same part in the governmental economy.

§ 69. While there are these resemblances of form, there are striking contrasts in the functions of the British and American national legislatures. Our Federal Congress is the creature of a power beyond and above it. To that power it must refer for all its authority. The written constitution called the body into life and being; prescribed the division into two houses, the method of choosing members, the rules by which their number shall be determined, and the subjects of legislation which are within their province. So minute, definite, and imperative are these provisions of the organic law, that if the national legislature transgress the limits thus mapped out, and the powers specifically conferred upon it, or which may be deemed reasonably, and by

legitimate inference, contained in the actual specifications, such acts are absolutely void; having the form, they are yet not law, and any citizen will be justified in disregarding them. And this is true, although the powers which the Congress has assumed may not have been expressly negatived and forbidden by the constitution. Furthermore, the Federal Legislature has no power in itself to alter in the slightest particular this fundamental law which thus underlies it, and which must give a sanction to all of its proceedings. So far as any attempt can go which begins and ends in that body itself, the constitution is to them unchangeable. The assumed source of all governmental authority, which at first adopted the constitution, the people, must be called in to remodel their work.

§ 70. In like manner, the State Legislatures are organized, determined, and, in a great measure, governed by the several written State constitutions. There is, however, a great and most important distinction between the two, the Federal Congress and the State Legislatures, in respect to the powers which they may each assume. The local assemblies may extend their labors over a wide field; they must follow the plain directions of their constitutions, and observe the limitations of the national Constitution; they cannot do what they are directly forbidden to do, but beyond these restrictions their power is complete. Thus, in comparing the statute books of the State and General governments, we shall find that one is confined to a few subjects; the foreign relations of the United States, the revenue, the regulations of commerce, the army and navy, and the management of wars, the postal service, the coining of money, the government of territories, a few special crimes against the government, and such like topics, while the other embraces all the questions which can affect the interests of the citizen; the definition and punishment of all crimes, the regulation of all kinds of property, the individual rights of all persons, the means of enforcing all claims

and duties, and all the internal arrangement and classification of the body politic.

§ 71. On the other hand the British Parliament is bound by no unalterable, precise, written constitution; it combines the powers of the Federal Congress and the State Legislatures; it legislates at once in regard to the most complicated affairs affecting the empire, both in her foreign and domestic relations, and to the insignificant local matters of a county or borough; it can govern the millions of India, and superintend the building of a bridge; it may organize an army and locate a railway; it has indeed been called omnipotent. To call the British Parliament omnipotent, is, however, only a figure of speech by which to illustrate its immense and all embracing authority. There is to them a constitution, of which they are not the creatures, like the United States Congress, but of which they are an integral part, as is the king, as are the nobles and commons, the church and laity, the judiciary, and still more, the general and inviolable principles which underlie and infuse the whole. This constitution, the growth and product of ages, the accumulation of the experiences of centuries, the result of generations of fierce conflict between kings and nobles, between both and commons, between power and liberty, is as really binding upon the imperial legislature, as are the written regulations of our convention of 1787 upon the Federal Congress.

§ 72. Yet with all this controlling force of the British constitution, it is true that Parliament may, within certain limits, alter it. They may not, indeed, by any act of the legislative will, abolish the kingly office, or the House of Lords; but they may, and have effected changes the most momentous in the fundamental law, without calling in the aid of the people in a legislative capacity. I do not now refer to the proceedings of Parliament during the Great Rebellion, when the monarchy was formally abolished, nor yet to the Revolution which displaced James II, and raised

William and Mary to the throne; but to its acts in the regular and constant exercise of its legitimate functions. The Reform Bill, by which Parliament reconstructed the representation and changed the methods of electing the Commons, and took a long step toward universal suffrage, was so marked and fruitful an alteration in the British Constitution, that one of England's greatest statesmen pronounced it a bloodless revolution.

§ 73. Another feature, common to the British and American legislatures, should be carefully noticed. In both, a proposed measure, which has been adopted by the two representative bodies, does not pass into the condition of a law, until it receives the assent of the executive. The English king and the American president and governors have a veto upon the acts of parliament and the legislatures. In exercising this prerogative, it is not supposed that the chief magistrate, be he king or president, possesses any direct personal power of enacting laws, independent of the aid and coöperation of the legislature; he is in theory a coördinate branch, his approval being as necessary as that of the others. Thus the description of the British Parliament is the King, Lords and Commons. The executive has, in the formal passage of a statute, only the same authority in degree and kind, which belongs collectively to the lords or to the commons, to the senate or to the lower house. In America the theory in this mutual balance is, that the president represents the people as a whole in their imperial capacity; that the senate represents them as collected into local commonwealths; and the members of the lower house represent them as divided into small and single constituencies. The action of the president then, in refusing his assent to a bill, is only that of the senate in rejecting a measure proposed by the house. There seems to be a prevailing belief that the president is only empowered to object to a bill when he deems it to be in violation of some provisions of the constitution. This is a mistake, for he may as well

be guided by considerations of mere expediency in his action, as may any senator or representative. In practice, the United States president seldom resorts to the veto, the British crown never.

§ 74. One other description of legislative assemblies remains to be mentioned, those which are convened on special occasions, for temporary and special purposes. In America they have become a part of the stated policy, authorized by law, and possessing powers which are not granted to the regularly constituted legislatures. In other countries such uses and purposes are unknown, although this form of the law making power has been resorted to in periods of revolution, as a part of the machinery by which society, when passing through crises of disorganization, is made to assume a new form and a new political basis. With us they are not revolutionary and exceptional, but legal and not unfrequent. They are summoned in times of profound peace, accomplish their ends and are dissolved, and the people yield to them implicit faith and obedience. In the United States they have received the technical name of Conventions, and to them has been committed from time to time the high duty of forming or altering the organic law of the nation and of the several States. The features which distinguish them from legislatures are, that they are called together by special provisions of statutes or of the constitutions; that they consist of but one body or house; that they have really a power supreme over the ordinary appliances of government, subject only in most instances to the ratification of the people; that they are thus distinct from, and above, the executive, legislature, and judiciary, for they have the power to make and unmake them; that their functions have in general been confined to a single class of subjects, and that, these being exercised, they are ended by the limitation of their own powers.

§ 75. The third class of agencies for the creation of the statutory law includes those supreme rulers, by whatever

name called, who have the power, independent of the aid or approval of democratic assemblies and representative bodies, of absolute legislation, so that their will, uttered and embodied in the form of general regulations, shall be a law unto the nation. Common as is such a power, yet in the civilized states of Europe it has in modern times often, and perhaps generally, been combined with one or both of the other sources of legislation.

§ 76. In Rome this supreme authority was lodged in the person and office of the emperor. During the continuance of the republic, and even under the reign of the kings, the Roman Commonwealth acknowledged, as the only legitimate sources of the statute law, the senate and the assemblies of the people. Upon the accession of the emperors, some little show of senatorial authority was for a considerable time kept up, but this was only a slight concession to the memories of the republic, and the sentiments of individual liberty. The will of the emperor was at first virtually, and afterward openly, the source of the statute. Although the law was promulgated under the form of senatorial decrees, these were only the echoes of the emperor's command, in substance and often in form dictated by him. But after the lapse of time had deadened the old feelings, blotted out in a measure the old memories, and accustomed the nation to the rule of one irresponsible head, even this disguise was thrown off, and the emperor, without any attempt at concealment, spoke into being the law of the land. Then was established the maxim, *Quod Principi placet legis habet vigorem.*

§ 77. The emperor was at once the chief executive, the chief magistrate, with the power of hearing causes on appeal, and the fountain of all ordinary legislation. His decisions as magistrate, and his declarations of statutory law, were expressed in Constitutions which were either general or special; general when they were addressed to the whole state, and were binding upon all its members; spe-

cial when they were only obligatory upon particular individuals, and in particular circumstances. A third class were, at times, general or special, according to the emperor's order. The general constitutions were termed edicts, and they alone in all respects resembled the statute in their general application and character. They were equal in their efficacy to the acts of parliament or of congress. The special constitutions were termed privileges, or private laws, and had for their object individuals, whether persons or things. This privilege might confer a right or benefit, or it might impose a duty. Modern legislative bodies, the English parliament, the American congress and State legislatures, frequently embody their will in the form of private statutes or privileges. As familiar instances, I will mention those statutes allowing a person to change his name, or permitting an alien to inherit property, or consenting that an officer of the United States may receive a gift from a foreign government. Those imperial constitutions which might be either general or special were divided into decrees, mandates, and rescripts. Decrees were simply judgments or decisions of cases brought before the emperor in his capacity of chief judicial magistrate. They had not then the character of what I have classed among the written jurisprudence, or law of enactment, but rather belonged to the division of the law of judicial decision. Mandates were simply instructions addressed to public officials, to guide them in their various duties. Rescripts were written answers to questions proposed to the emperor. If such enquiries were made by a public body or community, the emperor's answer was termed a Pragmatic Sanction; if a single individual, who was a public officer, thus called out a formal reply touching his official character, it was known as an Epistle. Finally, an Annotation or Subscription was written to a private person, in answer to questions of a merely private application. It is clear that rescripts could not in themselves have the force of general constitutions;

they were addressed to single persons or bodies, and were obligatory upon them alone; but it is equally plain that, upon the recurrence of similar or analogous circumstances or situations, they would form ready precedents for the guidance of the emperor in the solution of new questions as they should arise, and thus they came to be looked upon as a part of the universal law, binding upon the whole empire.

§ 78. Thus, during the existence of the empire, until it was overthrown in the west, and Italy and the provinces of Spain, Gaul, and Britain were overrun and subjugated by the barbarians, the imperial will had all the characteristics of the source of supreme power. It must not, however, be supposed, at least so far as concerned the general private jurisprudence of the empire, that this will was exercised in an arbitrary manner. Many of the emperors were savage, remorseless tyrants, before whom all considerations of right and justice were swept away in the gratification of their passions; property was seized, life was destroyed, honor was violated. But even during the reigns of some of the most violent, bloody and lustful emperors, the edicts and other constitutions relating to the general private law of the empire were strongly marked by wisdom, equity, and an enlightened public morality. This was partly due to the fact that the monarch, though theoretically supreme, as is the British Parliament, was in fact bound down, held in his place, and restrained by the law as it already existed; and partly to the fact that although the constitutions issued in the name of the emperor, bearing his sanction, they were often, and perhaps generally, the work of illustrious jurists, who held official places in the imperial household.

§ 79. It would be a matter foreign to my purpose, and involving too much unimportant detail, to trace the course of state policy and the changes of governmental organization in Europe, from the overthrow of the Western Empire down to the present time, in order to discover how great a share of power and influence kings and emperors have

exerted in forming and enacting the municipal law. This will be adverted to when I shall speak in particular of some of the historical sources of our jurisprudence, and especially of the feudal system. It is certain that, in France, during the vigorous age of feudalism, the royal prerogative had almost disappeared; that the king had been degraded from the position of monarch to the station of nominal head among powerful and independent feudal barons, and that with the decline of the feudal constitution, the kingly power increased, and culminated with Louis XIV., who could say with as much truth as point, "L'État c'est Moi." In our own day, the emperor of the French, the emperor of Austria, and the czar of the Russias, seem to occupy a somewhat analogous position to the Roman Cæsar, although they fall far short of his all pervading and irresistible power, as the supreme will whence emanated the whole public and governmental forces of the nation.

§ 80. It can hardly be said that any function of actual legislation is now lodged in the crown of Great Britain, apart from parliament. From the time of the Norman conqueror William, down to the reign of the first Charles, and the revolution which overthrew the house of the Stuarts, exiled James II., and placed William upon the throne, there had been a continual struggle between arbitrary power, unconfined and unlimited by the laws of the realm and the acts of parliament on the one side, and a determination on the other to control that authority and reduce it into plain and constitutional bounds. The earliest Norman kings were in a great measure absolute.* The first and principal check upon their irresponsible power was Magna Charta, granted by King John. Yet this would seem to have been an act of legislation on his part, so far as it established and confirmed the law of the kingdom, although it has been maintained that the great charter of English liberties con-

* See SPENCE, Equity Juris. Vol. I, pp. 124, 125.

tained no new regulations, but only a restatement and formal declaration, on the part of the king, of those which had been claimed and acknowledged to be law prior to its date, but which had been wrongfully encroached upon or entirely disregarded. In the progress of generations, through much contest and frequent vacillations, the kingly prerogative was circumscribed and clearly ascertained, until at present it is firmly settled, as a part of the English constitution, that the crown cannot make, add to, or repeal any law, but that, acting under and according to the law, and rather in his capacity of chief executive than as a legislator, he may by proclamation and for temporary purposes, suspend the operation of public laws, or declare when and how they shall be enforced.

As illustrations of the royal proclamations, I will mention those issued in the year 1861, maintaining a condition of neutrality between the United States and the seceding Southern States, and forbidding the export from British countries of gunpowder and other munitions of war. Others will be easily recalled by any student of history.

§ 81. The Constitution of the United States does not confer any separate power of legislation upon the president. With us Congress is the only source of the statute law. Still the executive has a prerogative similar to, though not so extensive as that of the king of Great Britain, to prevent and direct the enforcement of the laws by proclamation. He may, during the existence of an insurrection, suspend the writ of habeas corpus; he may order a blockade, and perform other quasi legislative acts, which would seem, however, to be all confined to the periods of actual war, and not to be permitted in the usual and peaceful administration of government.

§ 82. From this survey it will be seen that a purely democratic source of statutory law has been found only compatible with an imperfect civilization, when the people were collected into cities, and the intervening country and

its inhabitants were little heeded; that the exclusive kingly source of legislation had its greatest use and necessity in those countries where intelligence was but partially diffused, and among peoples turbulent and unruly; and that the supreme authority of legislative and representative bodies has accompanied a progressive culture, a condition of freedom common to large portions of the citizens, and a widespread intelligence and mental activity among the people.

§ 83. Having thus mentioned the several sources from which statutes emanate, I shall now describe in general terms the forms which they assume. In this respect they may be divided into two classes.

§ 84. 1. The first class contains those statutes which are enacted from time to time as occasion demands, which relate to a single subject or class of subjects, and which are, therefore, comparatively short and simple. Of this sort is all the written law of England, of the Federal Government of the United States, and the greater portion of that of the individual States. When some need is felt in any department of the law, when some new circumstance arises which demands statutory regulation, when some evil presses hard upon the community, invoking correction and remedy, when some new form of crime is perceived which requires a definitive and appropriate punishment, when some power is to be added to the officers of the government or some function is to be curtailed, the legislature interferes, and, by a single separate statute, enacts the regulation, corrects the evil, defines the crime, or establishes the power. Thus the legislation of these countries is made up of almost innumerable distinct fragments, embracing subjects of an infinite variety, some the work of centuries past, and others the creation of the present day. Hundreds, and perhaps thousands, of English statutes remain to this time unrepealed and yet inoperative, because the occasions which called them forth have passed away. And yet some of the most important statutes of the kingdom are of a very ancient date. Among these I

will mention that defining treason, passed in the reign of Edward III.

§ 85. Certain classes of legislative acts, once perfected, remain for years and generations unaltered, until society has so far advanced that additions and modifications are demanded to meet the slow requirements of the changing times. Such in the United States are the acts organizing the judiciary, and defining the jurisdiction and regulating proceedings in courts; the acts concerning navigation; the acts establishing ports, light houses, and post roads; the acts defining the duties of executive officers; the acts providing for the punishment of offences against the United States. Others are renewed yearly, or are frequently altered and repealed. Among the yearly statutes, the most important are the supply bills, by which money is furnished for the annual expenses of the government, for the army, the navy, and the civil departments. One peculiarity of the English constitution, which has always been esteemed as one of the strongest checks upon arbitrary power, and which the people have often used with the greatest success in their contests with the king, is the provision that all supply bills must originate in the House of Commons, which body, directly chosen from and responsible to the people, has the absolute control of the expenditure of the government, and the power to clog and even defeat any obnoxious measures of the executive by refusing to grant the needful money. Our Constitution has retained the same safeguard in the keeping of the lower house of Congress, and, with an extreme jealousy which distrusts not only the president and the representative, but even the people themselves, has forbidden any supplies to be granted for the army or navy for a period longer than two years.

§ 86. It is easy to see that great difficulties must attend this multiplication of single and separate statutes put forth from time to time to meet a special occasion. The gradual increase in their number finally becomes so enormous that

no one person can pretend to be acquainted with any considerable portion of them. The written law of the commonwealth is thus made to be a closed book not only to the people, but to the learned jurists. In England the number of statutes actually in force is immense. The accumulation of the acts of the United States Congress is of course far less, yet it is already a heavy task to number and collate them. The remedy for this practical evil leads me to the other division.

§ 87. 2. The second division embraces those statutes which are digested into the form of general national codes.

A complete national code would contain the whole municipal law of the commonwealth, reduced to a statutory form, and arranged after some definite and comprehensive plan, and would at once take the place of the mass of separate statutes and judicial decisions in which that law had been previously contained. Were such a compilation ideally perfect, it would dispense with most subsequent legislation, as well of parliaments as of courts. It would also be a line of division between the old and the new, and would cut off all communication with the past, as affording explanations of the legal rules of the present day. Nothing would be left for the tribunals but to apply the plain and direct provisions of this universal statute to the cases which should arise; there would be no room for extending principles by analogy, no adding on new rules, no lopping off old and irregular growths, because the legal principles would be no longer free and elastic, existing as a power and not as a form, but they would be all stated and sharply defined in the precise, dogmatic letter of the written instrument. Such codes have been attempted, but the ideal has never been fully wrought out in the actual; former legislation must be referred to for explanations of the written rule; courts must expound, limit, add to, and make law, as long as language is an imperfect means of expressing thought, and as long as societies continue to progress in civilization.

§ 88. An entirely new code of municipal law, composed of original regulations devised and put in force at one time as the product or invention of a single legislator or government, may well be considered impossible. The analogies of history are all opposed to such a creation. Whenever a national code has been constructed, it has been formed by compiling, arranging, condensing, and reducing to a compact and symmetrical structure the preëxisting system of legal rules, whether they were contained in tradition, judicial decisions, the writings of jurists, or statutes. The alterations have been more in form than in substance, and have consisted in great measure in the choice or rejection of particular portions from the whole mass, and in digesting the result into a condition of precision and unity.

There is still a dispute between the partizans of a general codification and those of the progressive, unwritten form of the law of judicial decision, as to the respective merits of the two systems; but without now entering into the discussion of the vexed question, I will state some of the principal, and to us most interesting examples of national codes.

§ 89. The earliest which I shall mention was the Roman Law of the Twelve Tables. As I have already stated, the ordinary means of legislation in the earliest periods of the Roman commonwealth was by senate decrees and the decisions of the popular assemblies; and there also existed, in all probability, parallel with these statutes, filling up their gaps and supplying their omissions, a body of rude, customary, or common laws. In the year B. C. 452, a commission is reported to have been sent by the senate to Greece, to study their institutions and jurisprudence, and to collect such information and material as would aid in compiling a digest for the Roman state. Upon the return of this commission, ten burghers were appointed under the name of decemvirs, who reduced the whole law to a compact form. The results of their labors appeared in the year B. C. 451,

This theory has been rejected. See Morey's Roman L. p. 25.

divided into ten tables, and in the following year two other portions were added, and thus the famous code of the Twelve Tables was completed. This compilation thereafter became the "Municipal Law" of Rome, and was the basis of all subsequent legislation, never having been formally repealed. But a few fragments remain of these celebrated enactments, and little is known of the detail of those which they superseded; but so far as can be ascertained or inferred, the Twelve Tables seem in a great measure to have been a digest of the former statutory and customary law.

§ 90. The regulations embodied in this code were certainly rude and severe, suited only to an uncultivated and partially barbarous people, little adapted to the subsequent growth of the state, and its progress and refinement in arts, manners, intelligence, and general civilization. The arrangement of the laws of the Twelve Tables seems to have been as follows:

Tables 1 and 2. Forms of Judicial Proceedings.
Table 3. The Law of Loans, Bailments, etc.
Table 4. The Law of Parent and Child.
Table 5. The Law of Inheritance and Wardship.
Table 6. The Law of Property and Possession.
Table 7. The Law of Damages.
Table 8. The Law of Servitude.
Table 9. The Public or Political Law.
Table 10. The Law as to Funerals.
Table 11. The Pontifical Law.
Table 12. The Law of Marriage and Divorce.

§ 91. From the date of the establishment of the laws of the Twelve Tables, B. C. 451, to the commencement of the reign of the Emperor Justinian, A. D. 527, was a period of 978 years. During this time Rome had passed through the glories of the republic and empire, and into its rapid decline; she had emerged from the provincial rudeness of the early period into the culture in arts, letters, and intellectual activity of the Augustan age, and had again partially sunk

into the embraces of barbarism. Her god Terminus had steadily marched to the confines of the known world, had there maintained his firm stand for long generations and dynasties, and had receded until even Italy and the imperial city itself had been yielded to the invaders. During these ten centuries the Roman law had made a progress equal to that of the Roman arms. It had been developed by senate decrees, by resolutions of the assemblies, by the edicts of magistrates, by the writings of jurists, and by the constitutions of emperors. And now the animating life had departed; the law was no longer a growing organism, instinct with vitality, the variable exponent of the nation's civilization. The time for a codification had arrived. When Justinian ascended the throne, but few attempts had been made to reduce this vast growth into any well-defined shape and symmetry. Under the Emperor Theodosius, a code had been made of the constitutions, analogous to a modern revision or digest of statutes; but the unwritten law, whether the product of judicial magistrates or of learned expounders of jurisprudence, still lay scattered through numberless writings, whose very multitude prevented any thorough study of the science. Justinian determined to reduce all of the existing municipal law to one complete code. To this end he intrusted the work to commissioners, over whom presided the first jurist of that age, Tribonian. "The theory of professors," says Gibbon, "was assisted by the practice of advocates and the experience of magistrates, and the whole undertaking was animated by the spirit of Tribonian." The imperial plan was to prepare first a compilation of the constitutions, and second, a digest of the unwritten law. The commission was appointed in February, A. D. 528, and the first work was completed and sanctioned by the Emperor in April, 529. It was subsequently again revised and received further additions, and was completed in November, 534. This work is known as "The Code." It is made up of imperial constitutions selected out

from the vast multitude of similar statutes, and arranged in order, forming twelve books, which are again divided into titles, and each title into laws. Another commission under the same presidency was appointed in December, A. D. 530, for the second undertaking, to collate, arrange, simplify, and codify the legal principles which were scattered through the writings of jurists, or, in other words, to embody the law of virtual judicial decision. This was a work of vast magnitude, because the material must be sought for among the legislation of a thousand years, and because the principles at first announced to meet particular cases must be arranged in a comprehensive and scientific form, and because the compilers had absolutely no precedent to follow in their labors. It would be justly esteemed a herculean task to codify the unwritten law of England, and yet English lawyers would have the aid of all other codes and systems, and thus models nearly perfect upon which to proceed. The Roman commission had no such helps, but in three years their work was done and published to the empire. It has received the names of the "Digest" and the "Pandects." It is divided into fifty books, and most of these again into titles. In addition to these exhaustive compilations, the Emperor directed an introduction to be prepared to the other two, designed for the use of students of legal science. The Code and the Pandects were intended to sum up the entire legislation of the empire, and were of course too bulky to be used as text books in law schools. Tribonian and two law professors composed, and, in November, A. D. 533, published the Institutes, which were also decreed to have the force of law. The Institutes consist of four books, which are divided into titles, and subdivided into sections. The work treats of persons as the subjects of legal rights, of things as the objects of rights, and of actions by which such rights are enforced. Book I is devoted to persons, Books II, III, and a part of IV, to things, and the remainder of the book to actions. These

three separate elements, the Code, the Pandects, and the Institutes, together with a few additional constitutions under the name of Novels, form the *Corpus Juris Civilis*, or body of the Roman law, which had passed through its periods of growth and vitality, and had been crystallized into the positive form of a single statutory enactment. As such it has come down to our own times, an inexhaustible fund of legal principles whence so much of the legislation of Europe and America has drawn its nourishment.

§ 92. The most important and widely known of modern national codifications is that of France, prepared and established as the body of the French municipal law by Napoleon, under the name of the Five Codes. Previous to the Revolution, the jurisprudence of France was in a most confused and unsatisfactory condition, and loudly called for amendment and revision. This was partially accomplished during the first years of the republic, and the criminal law in particular was much modified and amended. Napoleon formed and executed the plan of reducing all the law, which was partly customary and local, and partly based upon the Roman, into short, simple, precise, and definite codes. In their preparation the most extreme care was used to eliminate every error, to provide for every result, to test the expediency of every proposed measure. The discussions were frequent and searching, and the whole passed through many reviews before it was finally adopted as positive law. In August, 1800, a committee was appointed for this purpose, who reported in the following year the draft of a civil code. This draft was submitted to the judges of the highest courts of the nation for revision, and afterward was discussed, article by article, in the council of state, over which Napoleon presided It was transmitted from that body to another council, when the articles were adopted, amended, or rejected.

§ 93. The first and principal result of this care and

labor was the *Code Napoleon;* or, as it has since been called, the *Code Civil.* To render its provisions simple and precise, it is divided into many short paragraphs, which are numbered for convenience of reference. The whole is separated into three books corresponding to grand divisions of legal science. The first book treats of persons, the second of property and the different modifications of ownership, and the third of the modes of acquiring property. Book I contains eleven titles, viz.: 1. Of the enjoyment and privation of civil rights; 2. Of civil acts, such as the registry of births, marriages, and deaths; 3. Of domicil; 4. Of absentees; 5. Of marriage; 6. Of divorce; 7. Of father and child; 8. Of adoption, and one kind of guardianship; 9. Of the parental power; 10. Of minority, guardianship, and emancipation; 11. Of majority, and the guardianship of persons of age.

Book II contains four titles: 1. Of the divisions of real and personal property; 2. Of ownership; 3. Of usufruct, of use and habitation; 4. Of servitudes or easements.

Book III contains twenty titles: 1. Of successions and inheritances; 2. Of donations between the living, and of wills; 3. Of contracts expressed; 4. Of engagements or obligations, without a formal agreement; 5. Of the contract of marriage and the rights of the parties; 6. Of sales; 7. Of exchange; 8. Of letting to hire; 9. Of partnerships; 10. Of loans; 11. Of deposits; 12. Of contracts connected with chance; 13. Of agency; 14. Of security; 15. Of compounding actions; 16. Of arrest in civil cases; 17. Of pledges; 18. Of mortgages; 19. Of forcible ejection, and order of distribution among creditors; 20. Of prescriptions.

In addition to the *Code Civil,* the *Code de Commerce* contains the regulations of commerce and navigation. The criminal law is comprised in the *Code Penal,* which defines crimes and apportions the punishment, and in the *Code d'Instruction Criminelle,* which directs the whole judicial procedure by which an offender is arrested, tried, and con-

demned. Finally, the *Code de Procedure Civile* regulates the practice and procedure in civil actions. These five codes, adopted and promulgated under the auspices of Napoleon, formed the body of the law of France regulating private rights and duties, and they remain, with slight alterations, to the present day. They were introduced into several other countries by the victorious arms of the empire, but with the fall of Napoleon have given place again to the local laws. They certainly possess the merits of brevity, clearness, and precision, and are a vast improvement upon the confused and often contradictory law which they superseded, but have not prevented an accumulation of judicial decisions built upon and expository of their provisions.

§ 94. National codes of private law have been adopted in several other European countries, among which are Prussia and Austria. These all have for their basis the Roman law, as preserved in the compilations of Justinian. In England the plan of codifying has never met with favor among the lawyers, with the bench, or with government. No attempt has ever been made to digest and consolidate the statutes, even those relating to affiliated classes of subjects.

§ 95. In many of the States of America, partial codification is common, and in Louisiana the whole municipal law has been recast into that form. The jurisprudence of the territory of Orleans, before it was ceded to the United States, was derived from that of France and Spain. In 1824, under the authority of the legislature, the "Civil Code of the State of Louisiana" was prepared and enacted. The groundwork of this statute is essentially the Roman law; it follows in many of its features the *Code Napoleon* of France, and is very unlike, in its methods, statements, reasoning, and provisions, the legislation of the other States of the Union. Subsequently a criminal code was adopted, which more nearly conforms to the English and American law.

§ 96. I will illustrate a partial codification by that of the State of New York. Prior to the year 1830 the law of that commonwealth existed in its condition of statutory and unwritten, very similar to that of England. In that year a partial code, carefully prepared by a commission appointed for that purpose, was adopted by the Legislature, under the name of the Revised Statutes. This remarkable work is partly a digest of former statutes, and partly a codification of legal principles and rules which had been established by the courts. The revisers, however, often greatly altered, and sometimes entirely restated these rules of the common law. The Revised Statutes do not assume to interfere with many of the most important departments of the private law, leaving untouched the subject of personal contracts and all the vast interests which flow from it, commercial and maritime law, the law of personal rights and duties, and the law of evidence. This code consists of two principal divisions, the first relating to the political jurisprudence of the State, and the second being confined to private law. The first division, in general terms, embraces the administrative machinery of the government; the internal divisions of the territory; the local, county, and town governments; the care of the poor; the construction and maintenance of highways; the management of canals and other internal improvements; also regulations of a *quasi* public character, including the formation and control of banking, railway, and other corporations, and similar subjects. In the second division of the work, one title is devoted to real property. Here the changes are the most numerous and radical, and have gone far toward reducing the unwritten law to a few short chapters, made up of brief and concise sections. Another title treats of successions, or the management, settlement, and distribution of the estates of deceased persons, and the powers and duties of executors and administrators. Another still is a complete code of crimes and punishments, replacing entirely

the unwritten law, and substituting the certainty of a statute for its somewhat vague and shifting rules. Another title is devoted to the organization and jurisdiction of courts, and the methods of procedure therein.

§ 97. One peculiarity of this and other such revisions is that, as it does not purport to contain the entire jurisprudence of the State, it leaves the old unwritten law still in existence, surrounding and penetrating it, explaining its provisions, supplying its omissions, and to a certain extent correcting its mistakes. The important branches of the private law which it has remodelled are those of real estate, of successions, and of crimes and punishments; its references to other departments are rather incidental and exceptional, not serving to disturb the general current of judicial decision. I have thus described somewhat particularly the Revised Statutes of New York, because they form an important element in our national methods of legislation, and have been closely copied or essentially followed in very many of the other American commonwealths.

## CHAPTER II.

### THE UNWRITTEN LAW, OR LAW OF JUDICIAL DECISION: ITS MEANS AND INSTRUMENTS OF DEVELOPMENT.

§ 98. THE second grand division of the municipal law has, in England and America, been wrought into the form of precise and authoritative regulations, through the agency of judicial tribunals. The process of growth has of course been slow, and to a certain extent irregular and unscientific. Our institutions do not permit that the judges of the several courts should at any time set forth and enact a comprehensive system of laws, nor even of the rules which relate to any particular subject or class of subjects. They do not assume to legislate in the manner and form of parliaments; they do not pretend, by any one decision or series of decisions, to exhaust a topic, and to give all the relations and bearings of a principle. Each case which arises before them is determined, and the particular rules necessary for its separate decision are stated, and thus pass into the domain of positive law. As multitudes of cases succeed each other, the system is slowly built up by steady accretions. Of the spirit and essential features of this gradual development of the unwritten law, I shall speak at large in the following chapter. The present chapter is devoted to a description of the machinery through whose means this development has been effected, the organization and jurisdiction of courts, and the methods by which a legal

dispute is conducted from its commencement to the final judgment establishing the rights of the parties, and giving a sanction to the legal rule.

## SECTION I.

### DIVISIONS OF THE SUBJECT.

§ 99. In the practical operation of a national jurisprudence, as well in states of modern Europe as in the Roman commonwealth, two classes of questions must be presented to courts, to be determined in each particular case.

1. The one class requires the examination, by means of evidence, and the decision of controverted matters of fact, and

2. The other demands the formal statement and application of the rules of law which are involved in the admitted or proven facts.

§ 100. Corresponding to these divisions of the questions which enter into the judicial settlement of all legal disputes, courts may, from their inherent nature, be separated into two classes, viz.:

1. Those which provide different persons to decide the facts and the law; and,

2. Those in which both subjects are committed to the same judges. In these two general divisions are included all the forms and species of courts which are in use in civilized countries.

§ 101. Again, the methods of bringing the disputes of parties, and the various particulars involved therein, to the attention of the courts, so that they may acquire the power and knowledge to decide, are different. They may be,

1. By informal oral statements;

2. By a more formal written explication;

3. By a combination of the two.

These three divisions include all the means of presenting questions of fact and law to a judicial tribunal by process, by pleadings, by evidence, and by argument.

§ 102. Looking at this subject from a standpoint back of all experience, we should naturally suppose that the instruments and forms for trying legal controversies would have been contrived with sole reference to a speedy, simple, and effectual discovery and establishment of the truth; that they would but slightly feel the power of the past moulding their character. We shall find, however, that no other portion of our jurisprudence more clearly shows the effect of the national history. None of these methods have been invented or arranged upon any *à priori* reasoning; they are rather the results of ancient institutions and customs perpetuated to our day, greatly modified indeed from time to time, and in later years losing much of their original arbitrary character. This truth will be plain when I shall speak in particular of judicial procedure, and show the influence of Saxon, Feudal, and Roman law upon it.

§ 103. In considering the branch of my subject to which the present chapter is devoted, I shall first proceed to investigate the method of separating the facts from the law in judicial trials, and committing their decision to distinct classes of persons, and therein to give a sketch of the origin, progress, and use of the English and American jury trial.

Secondly, I shall set forth the origin, history, and jurisdiction of the English and American courts, and compare them somewhat with those of other countries, ancient and modern. Under this head I shall treat, 1st, Of those superior courts which use the jury as a part of their regular organization, and which are technically known as "law courts;" 2d, Of equity courts; 3d, Of ecclesiastical courts; 4th, of admiralty courts.

Thirdly, I shall explain the manner in which a controversy is brought before these several tribunals, and by them considered, tried, and decided, and shall compare these methods with those of some other countries, ancient and modern. This review will describe the means by which

rights and duties are legally enforced through *actions*, and will state,

1st. The foundation of an action by the original process or proceeding, through which the court acquires jurisdiction over the subject matter and the person complained of.

2d. The origin, history, and divisions of the various kinds of action, with the reasons for their invention, and the uses which they have subserved in developing the law.

3d. The manner of introducing the disputed facts and the respective claims of the parties to the attention of the court by the formal pleadings.

4th. The method of proving the asserted facts by evidence offered to the judges or juries whose province it is to decide these questions.

5th. The method of establishing the propositions of law by the arguments of counsel, and

6th. The action of the jury and judges in deciding and rendering a judgment, and the effect of the latter upon the rights of the parties and upon the law.

This outline will include both civil and criminal proceedings.

## SECTION II.

### OF THE SEPARATION OF THE QUESTIONS OF LAW FROM THOSE OF FACT, AND HEREIN OF THE JURY TRIAL.

§ 104. The modern jury trial is undoubtedly a development of English institutions and civilization. It has, of late years, been imported from England into some of the continental states of Europe, and there drags out an unnatural and sickly life. The practice of separating the questions of law from those of fact, and intrusting their decision to distinct tribunals, is, however, as ancient as the earliest days of the Roman republic. It was fully organized by the Roman jurisprudence, and for centuries formed a part of their *ordinary* procedure in the trial of civil causes.

§ 105. Two distinct and equally important elements are involved in the idea of the modern jury trial. These are the allotment of the matters of fact to a number of individuals specially appointed for that purpose, different from the official judges; and the free choice of these persons for each particular case from the general mass of the worthy citizens of the state. In our investigation into the origin and history of trial by jury, we should remember that these two elements are by no means necessarily connected; that the existence of one does not presuppose the other. Indeed, each has for centuries formed a part of great national institutions without the other. The Romans had the first; the ancient Germanic tribes, who subjugated the western Roman provinces, the Franks, the Saxons, and others, had the second, their courts being made up from the body of the people, but determining at once the law and the facts. We must examine the course of development of both these ideas before we can arrive at a correct conception of the English and American jury trial.

§ 106. A slight sketch of the Roman procedure will now suffice to exhibit their practice in treating the questions of fact in a forensic contest; a more complete account will be given hereafter. Without going back to the times of the kings, when our knowledge of judicial institutions and proceedings is somewhat vague, we find in the second period of the history of the Roman law, commencing with the Twelve Tables, that an orderly and well compacted system was established. Passing by the criminal jurisprudence, there were, for the consideration of civil causes, distinct *magistrates*, whose functions were similar in principle to those of our superior judges. The most important of these were the prætors. These magistrates possessed two kinds of jurisdiction, the one *ordinary*, the other *extraordinary*. In the former they were the sole judges of the law. Actions were commenced before them; the parties made their allegations or pleadings, which were reduced to

writing; the issue was joined, or, in other words, the law and facts stated upon one side were denied on the other, and the cause was ready for trial. The magistrate at this point rendered his decision upon the law, (which was necessarily conditional in its character), defining the legal rule applicable to the case, and showing how, if the facts should be established in one way or another, the judgment should be given. All this was done before the evidence was introduced to prove the facts. Here the judicial functions of the magistrate ended, and he transmitted the cause to a judge (Judex), agreed upon by the parties or appointed by himself, who heard the proofs, decided the facts, and gave a final judgment under the guidance of the rule of law laid down by the magistrate. The proceedings before him were similar to those before our juries; witnesses were examined, counsel argued, and a verdict was rendered.

§ 107. It is easy to see, under outward differences, a striking analogy between this Roman method and our own. With us there is one trial; the testimony is offered before judge and jury together; at its conclusion the court pronounces the law in the form of an oral charge, and the jury consider the facts in the light of the directions received from the bench. The Roman procedure required in fact two trials: at one the legal principle was discussed and decided by a magistrate, and reduced to a written form, which supplied the place of a charge; at the other the facts were determined, and a decision made settling the rights of the parties by a lay judge. The proceeding before the magistrate was said to be *in jure;* that before the judge was *in judicio.* It is thus evident that, by the Roman procedure, the questions of law and those of fact were even more completely separated in judicial trials than by our own.

§ 108. From whom the judges (judices) were selected in each particular case does not clearly appear. Some writers suppose that their choice was confined to a small body of

the citizens specially designated for that purpose. In certain cases the cause, instead of being sent to a single judge, was committed to a number of persons called *recuperatores;* but of their character and functions, further than that they were judges of the facts, according to Hugo, very little is known. When the judge was directed to decide according to equity and good conscience, without strict reference to the instructions of the magistrate, he was called an arbiter. It is certain that the great body of the citizens were not called upon, as they are in England and America, to interfere in judicial contests, and to take a controlling part in forensic trials in civil causes, but that the judges of fact, though laymen, were a special and limited class. This was the *ordinary* jurisdiction of the magistrate; by the *extraordinary,* he decided at once the law and the facts of a cause.

§ 109. Thus the institution existed for centuries, during the republic and under a portion of the emperors, the extraordinary power of the prætors constantly increasing and supplanting the ordinary, until, by an edict of the Emperor Constantius, A. D. 352, the latter was abolished, and the only method of trial became that in which all the questions were left to the same magistrate for decision. This practice was incorporated in the final codification of the Roman law under Justinian, and has descended to us as one of its essential features, particularly distinguishing it from the common law of England. With the change made in the Roman jurisprudence by the imperial policy, the separation of the questions of law and fact disappeared in European states, to reappear centuries after, while the English jury trial was reaching, through many progressive stages, its present well-defined form

§ 110. I now propose to sketch the origin and development of that feature of the trial by jury which demands that the jurors shall be chosen at large from the body of the responsible citizens of a county or district, calling upon

the people to perform duties in forensic trials equal in importance to those of the judges. This idea is undoubtedly of Germanic origin.* The German tribes, at the time of the final irruptions into Gaul and Italy and Britain, had nothing like our jury, yet they possessed judicial institutions, which, by the natural progress of society in civilization and the constant adaptation of old principles to new uses, have developed into the strict trial by jury. These tribunals seem to have been confined to no one tribe, but to have been common to all the separate nations which, at different epochs, effected a lodgment in the Roman provinces. Herein we may discover one bond which linked

* Mr. Spence, in his history of the Equitable Jurisdiction of the Court of Chancery, vol. 1, pp. 65, 66, declares that the Courts of freemen, which, he acknowledges, were common to all the Germanic tribes after their conquests, were still not of German origin, but were borrowed by these rude barbarians from the Roman provincial institutions. Strangely enough he cites Savigny, (History of the Roman Law during the Middle Ages), in support of this position. While acknowledging much useful help from Mr. Spence's work, and readily conceding that it is a most valuable contribution to the history of English law, I am constrained to differ from that learned writer in this, as in many other important particulars. Mr. Spence seems to be carried away with very slight, casual, out ward resemblances between the institutions of different people, without duly considering whether they have any real ethnic or other connection, as of cause and effect, or germ and fruit. He is entirely mastered by the idea that almost all the customs and laws of the German invaders, as they appear to us far back towards the conquest as annals run, were the products of the superior Roman civilization and jurisprudence acting upon the untutored barbarians. I shall have occasion hereafter to remark upon his theory of the origin of the feudal system. In regard to the particular point under consideration, M. Savigny is clear and abundant in his demonstration of the complete Germanic origin of the idea of these courts of freemen. His first volume, which I have followed in the text, and which I shall hereafter follow, leaves nothing to be questioned upon this subject, and when Mr. Spence quotes him as an authority for his own theory, it must be under an entire misconception of that distinguished writer's meaning. Mr. Spence has also overlooked the fact that the Anglo-Saxons did not find the Roman institutions at work to any great extent in Britain, at the time of their invasion; the governors, presidents, judges, as well as the legions, had long before left the province, and abandoned it to its original possessors, who, in their internecine wars, soon obliterated most of the traces of Roman rule.

these rude people in a general ethnic relationship, and indicated the state of culture which they had all reached, a state far enough behind that of the feudal ages, but greatly in advance of the condition of the American Indians, to whom they have been likened by M. Guizot in his "Lectures on the History of Civilization."

§ 111. Perhaps the most striking feature of the polity of the Germanic invaders, the Lombards, the Visigoths, the Burgundians, the Franks, the Saxons, and Angles, was the existence among them of a class who bore the name of Freemen. Their condition was not simply that of liberty as opposed to slavery, but was something more substantial, involving the capacity to enjoy and the actual exercise of all the personal rights which can belong to citizens. The territory seized by the barbarians was divided into districts or cantons, each being governed by a count, who had military command and civil jurisdiction. The courts were held in each of these districts, and were presided over by the count or his delegate, while they were in fact composed of the collective freemen. This seems to be the outline of the system at once established by the conquering Germans, and it would do violence to all probability to suppose that it was not brought by them as a part of their national institutions.

§ 112. Among the Lombards in Italy the name Arimann was given as a general term of description to the freemen, and distinguished them from serfs and from magistrates. Among the early Franks the term Rachinbourgs was in like manner applied to the same class, as was also the equivalent, boni homines, good men. These freemen, Arimanns, Rachinbourgs, or boni homines, were originally the sole judges in all judicial trials. A court sat three times a year in each district, and special ones in the intervals if necessary. They were presided over by the count or other magistrate, but he took no part whatever in the decision, either of law or fact. The triers of all cases

were the assembled freemen, either coming together in a mass thrice a year, or specially summoned at other times. They judged the fact, and applied the law. There was no separation of these questions, but the good men and true had an irresponsible power in preserving rights and enforcing duties. The count probably instructed these untutored judges, but could not compel their votes; he could only keep them in order, and execute their judgments.

§ 113. This method of judicial trial prevailed over all the states which were subjected to the German domination. But in the process of time the right of the freemen to attend the courts, and intervene in the administration of justice, came to be considered as a burden instead of a sacred privilege, and Charlemagne introduced a class of appointed or selected judges termed scabini, who could supply the places of the neglectful freemen. Still, even with this revolution in the constitution of courts, the freemen were not entirely debarred from the exercise of their right to act as judges; they might still claim to be associated with the scabini, and to aid in determining the controversies brought to them for adjudication.

§ 114. Among the Anglo-Saxons the same institutions prevailed. Without examining at this place the different kinds of courts, it is sufficient to say that they were presided over by an ealdorman, a high official corresponding to the Frankish count, or by a deputy or delegate (gerefa), assisted in later times by a bishop or other ecclesiastic, and were composed of the freemen of the shire or other district in which the court was held. These freemen decided the whole controversy, and the sole duty of the ealdorman was to carry their judgments into effect. An account of the proceedings in one of these courts, taken from an old chronicle, may not be uninteresting. In the reign of King Knut, a shire gemote, or court of the county, was held, presided over by the ealdorman and a bishop, and composed of a large number of thanes, or freemen: "To this gemote

Edwin came, and spake against his mother concerning some lands. The bishop asked who would answer for her. Thurcil the White said he would if he knew the complaint, but that he was ignorant about it. Three thanes of the gemote were showed where she lived, and rode to her and asked what dispute she had about the land for which her son was impleading her. She said that she had no land which belonged to him, and was angry against her son. She called Lleofleda, her relation, the wife of Thurcil the White, and before them thus addressed her: 'Here sits Lleofleda, my kinswoman. I give thee both my lands, my gold, and my clothes, and all that I have after my life.' She then said to the thanes, 'Do thane-like, and relate well what I have said to the gemote before all the good men, and tell them to whom I have given my lands and my property, but to my son nothing, and pray them to be witnesses of this.' And they did so, and rode to the gemote, and told all the good men there what she had said to them. Then stood up Thurcil the White in that gemote, and prayed all the thanes to give to his wife all the lands which her relation had given to her; and they did so, and Thurcil the White rode to St. Ethelbert's church by all the folks' leave and witness, and left it to be set down in our Christ's book."

§ 115. Thus we find, common to all the Germanic tribes, from Italy to Britain, this principle of the freemen acting as judges in the courts, deciding both the law and the facts. In it we have the germ of the English jury. This latter was not perfected until long after, during which time the principle had been recast into many forms. But the progress was sure, and the result such as was demanded by the growth of the law in scientific precision and comprehensiveness. According to Eichhorn, juries, as we now understand the term, were introduced, when, the law having become a science, the impossibility that its knowledge should remain popular rendered the old institution impra-

ticable. Then recourse was had to an instructed judge, who should decide the questions of law, while the facts were left, as before, to the uninstructed freemen.

§ 116. It may be asked why, as the same germ of the institution existed among the primitive laws and customs of the affiliated peoples extending over the whole of Western Europe, did not the jury trial grow up by natural sequence of events in France and Italy and Spain, as well as in England? To answer this question I must a little anticipate a subject which will be more fully treated in a subsequent chapter—the influence of the Roman law upon modern jurisprudence. When the Germanic tribes invaded Gaul and Italy and Spain, they found a Roman civilization and Roman laws firmly established and controlling the entire populations. By that law, as then administered, the magistrates, as I have shown, judged both the law and the fact in civil cases. The Justinian compilations knew no other procedure. This system of jurisprudence, though partially overwhelmed by the barbarian polity, never ceased entirely to exist, but was suffered to flourish side by side with that of the invaders. In the progress of time, as the new comers and their descendants became more and more amalgamated with the old races, the state of society advanced, and required more comprehensive rules of legislation, and the Roman element began to be generally felt in moulding the jurisprudence of the whole people. Thus the national ideas of the conquerors were greatly modified by the presence and influence of the settled provisions of the Roman codes. All this required generations and centuries for its accomplishment, but the final result was uniform throughout these nations. The primitive laws of the Germans were recast in a Roman mould, and the ancient free tribunals of the Arimanns and Rachinbourgs gave place at length to courts constituted upon the Imperial model, with professional judges, who considered all the questions of law and fact which could arise on the trial of a cause.

§ 117. In Britain the same influence did not work with equal power. Britain had indeed been a province of the empire, but even at the height of the Roman domination was in a far different condition from the provinces of the continent. But in the interval between the abandonment of the island to the natives by the withdrawal of the legions and governors, and the completed invasion of the Angles and Saxons, the vestiges of the Roman policy and laws had been nearly swept away by the continual wars between the Britons and the wild tribes of the North. The Saxons were met by the institutions of the Keltic races, somewhat modified without doubt by generations of contact with their foreign rulers; but the Roman element was not sufficiently powerful and concentrated to warp the development of the pure Saxon ideas in their natural order. The Franks, Lombards and other barbarian nations, on the contrary, met the Roman laws and institutions existing in full force, and, although at first overwhelming them by their rude violence, yet finally yielded to their inherent and vital power. Thus in England we have the jury trial as the fruit of the ancient German assemblages of freemen in the courts; on the continent the same seed has produced a growth of a far different form, perpetuating the ideas and policy of the later Roman emperors.

§ 118. I shall now, in a summary way, describe the process of the development from the ancient district courts of the Anglo-Saxons, when the mass of the freemen assembled and gave judgment, to the final establishment of the present jury trial. These two extremes are clear and unmistakable; the interval is more vague and uncertain. The various stages or steps of the progress are not sharply defined and distinguished from each other. As a natural consequence of an unsettled and even turbulent society, with a political organization divided into semi-independent shires or counties and smaller districts, without an overwhelming central power in king or legislature to prescribe

common laws for the whole people, we shall find different forms of judicial procedure coexisting and combined. The old court of freemen will be associated with more restricted bodies of men who actually decide the questions at issue, and will not disappear until even a third period of the development has been reached. The general continuity is also broken by the use of the ordeal of hot water and hot iron, and the wager of battle or personal duel, and other methods of appealing to the supposed interference of Providence introduced by the deep religious feelings of the times. Although I shall not be able accurately to mark the progressive steps, and point out the period when one ceased and the next began, yet the general order of progress is sufficiently clear. When the jury trial actually began cannot be stated; but the transitions which prepared the way and finally ended in the perfected institution may be collected from the documents, chronicles, and records preserved to our own times.

§ 119. In surveying the state of society and civilization among the German nations, we discover an important idea that seems to have been common to them all—the personal trust which was reposed in families and communities for the good behavior and character of their members, and the great reliance which was placed in the voluntary oaths of freemen. This idea found its full development among the Saxons in the institution of Frank Pledge, which will be more fully described in the sequel. It was also the basis of a species of procedure in judicial trials, which formed the first step toward the modern jury. As the primitive collections of Germanic laws are almost entirely occupied with the definition and punishment of crimes, we shall find that most of the illustrations of our subject are connected with criminal or quasi criminal trials.

§ 120. According to the Salic and Ripuarian codes of the Franks, which were composed at least before the eighth century, when an offender was summoned before the court

of freemen, the questions of fact were rarely established by the testimony of any witnesses cognizant of the events. The ordeal of hot water or iron, or the judicial combat, was sometimes resorted to, but the ordinary method of determining the question of guilt or innocence was by the oaths of *conjuratores* or *compurgators*. The defendant was summoned to bring with him his relations or neighbors, varying in number according to the degree of the offence, and perhaps the value of the property, from six, eight, nine, twelve, fifty, seventy-two, to one hundred, who with the party himself should make solemn oath that he had not done the thing charged upon him. The complainant might rebut this defence by bringing forward a like number of his friends or neighbors, who by their oaths supported the charge. These compurgators were not witnesses, for they might know nothing of the facts, nor were they a jury, for they had no evidence laid before them except, perhaps, the assertions of the person whom they sustained. Their only knowledge was of his character, and they based their oaths upon a conviction, from their acquaintance with him, of the probability or improbability of his having committed the wrong, or brought a false charge.

§ 121. The same custom was common among the Anglo Saxons, and was recognized in several of the codes of laws enacted by their kings. Thus the laws of Alfred provided that a king's thane accused of homicide should purge himself by the oath of twelve king's thanes, and that a thane of less rank should rely upon the oaths of eleven of his equals, and one king's thane. In another code it was ordered that a king's thane accused of heathenish practices should purge himself by the oaths of thirty-six compurgators. Other charges were met by a less number. The value or relative effect of an oath varied with the rank of the compurgator.

§ 122. This is the first step, and it is only a step toward the jury. Some writers, and among them, Mr. Sharon Tur-

ner, see in these customs, the jury already organized and at work; they suppose that these conjurators were chosen persons, who possessed the functions of veritable triers, hearing and weighing the evidence of the parties. But a reference to the kindred institutions of the affiliated tribes on the continent shows this theory to be untrue. The custom operated to transfer the decision from the court of freemen to the twelve, or more or less compurgators, for the collective oath of these latter, made upon their own responsibility, had the effect to end a dispute, and the court only affirmed the result of their action.

§ 123. How long this method prevailed, it is impossible to determine with accuracy. It doubtless existed side by side, or in connection with the next transition, which I shall soon describe. I think that there is no satisfactory evidence of anything like our present jury trial at the time of the Norman conquest. Mr. S. Turner assumes that it was fully developed at that epoch, and some other writers hold the same opinion, but the weight of modern authority is against this supposition. The case upon which Mr. Turner relies, may, I think, be completely explained by a reference to the custom of conjurators, or of recognitors, which was the succeeding stage of the development. That case is, briefly, as follows: In the reign of William the Conqueror, there was a dispute whether some land belonged to the church or to the king. The freemen of the county were summoned into their court to try this question. This court, overawed by the king's officer, the sheriff, decided that the land was the property of the crown. The presiding bishop was dissatisfied with the result, and ordered that they should choose from their number twelve men, who should confirm with their oath what had been declared. These also, being suborned by the sheriff, made oath that the land was the king's. They afterwards confessed that they had forsworn themselves, and were condemned for perjury. Mr. Turner discovers in these twelve men a true jury, who heard the

evidence laid before them, and decided falsely upon it. I think, on the contrary, that we have in this story, only the usual compurgators, who were called upon to sustain the action of the court by oaths made upon their own responsibility, and therein committed perjury, as was probably often the case; or they were recognitors, or persons who assumed to decide from their own personal knowledge, as I shall soon explain in detail. The only point of analogy between many of these cases and the modern jury lies in the use of the number twelve. This number, or some multiple of it, constantly appears in the Anglo Saxon customs, and may be traced in the laws of the continental nations.

§ 124. The practice of relying upon the oaths of compurgators, unsupported by any evidence, and founded upon no knowledge of the facts, could only exist in a very rude state of society. Its basis was an unbounded confidence in personal integrity, and it must have inevitably produced a vast amount of perjury. This liability of the ends of justice to be defeated by gross perjury, together with the cumbrous working of the unwieldy and often tumultuous courts of the Shire, and Hundred, must have been the efficient cause of the transition which followed next in chronological order. Still, as before stated, it is impossible to separate clearly and sharply this new institution from the simple court of freemen, and from the use of compurgators. All three went on together, although the new invention, which was a nearer approach to the jury, outlived the other two, and has, indeed, in some of its elements, been retained into quite modern times.

§ 125. This second transition consisted in the delegation, by the courts of freemen or their president, of the power and duty to decide in a particular case, to a limited number of freemen selected from the district, and this number was generally twelve or some multiple of twelve. This delegated body did not act without knowledge of the facts involved in the dispute, but still they heard no evidence or

argument. They decided entirely upon their own personal knowledge and information. In the selection of these persons, who were called recognitors, care was taken that they should be acquainted with the circumstances of the case, with the litigant parties, with the situation and ownership of the disputed property. They were, therefore, invariably chosen from the immediate vicinity of the parties or of the land in question. In doubtful cases they were strictly examined to discover the amount and sources of their knowledge. When appointed, they heard no evidence or allegations, but retired apart, and by comparing their previous information, whether acquired by sight of the occurrences, or by tradition in the vicinage, or by any other means, they rendered their decision or verdict, *vere dictum*, upon oath. As they assumed to speak upon oath, from their own personal knowledge, they were liable to the penalties of perjury if they returned a false verdict.

§ 126. When this innovation was first made, cannot be accurately told. Mr. Hallam is of opinion that it was introduced by the Normans. It was a long advance from the primitive courts, and the use of oaths based upon the personal characters of the litigant parties, toward the trial by jury. It was an undeveloped jury; the germ had sprouted, and the possible jury lay enfolded in the bud. The unwieldy court of freemen was replaced by a tribunal of a limited and definite number. These twelve triers acted upon some cognizance of the facts involved in the dispute, but they derived that information from themselves; they were, indeed, a jury of witnesses testifying to each other.

§ 127. All the subsequent steps in the progress consisted in devices to aid this body of the freemen of the vicinage by the testimony of other persons not included in their number. When the divorce was effected between those acquainted with the matter in contest, and those appointed to decide upon it, the jury trial was essentially complete.

§ 128. A modification of the simple institution of recog

nitors was soon made by allowing them in certain cases, not only to speak from their own knowledge, or from tradition, but also to search for evidence and information from others, although as yet none was formally offered to them.

§ 129. In the reign of Henry III. (A. D., 1216–1270), an important innovation was made by joining witnesses with recognitors in one body. This was done to give those summoned from the vicinage the help of others who could testify to the facts, and all together united in making the verdict.

§ 130. In the twenty-third year of Edward III. (A. D., 1350), witnesses appear merely connected with or adjoined to the recognitors, who gave them the aid of their testimony, but took no part in the decision. This modification was the commencement of the practice of formally introducing evidence to the jury from persons who did not compose it, and in the opinion of Mr. Starkie and of Mr. Spence it is the connecting link between the ancient and the modern jury trial.

§ 131. The innovation once made, the progress was rapid; and the recognitors were more and more aided by the testimony of witnesses, but their evidence was liable to be irregular and improper, as it was subject to little or no control from the judges. At length, in the reign of Henry IV., another very important change was effected, and all the evidence was required to be publicly given to the jury in the presence of the court, so that the judges might control the proceedings, and reject such proofs as were improper. This innovation at once produced that high dramatic character which attends a jury trial in English and American courts; it afforded scope for the exhibition of the skill and acumen of counsel, and opportunity for those forensic contests which preëminently distinguish our tribunals.

§ 132. We have now almost reached the present jury trial. Yet the rule still prevailed of summoning the jurors

from the vicinage, so that they should be acquainted with the parties, the property, and the circumstances of the cause. However necessary this might be when the jurymen were mere recognitors, it was a jarring element when the greater reliance was placed upon the testimony of witnesses. The local prejudices and imperfect knowledge of the triers would interfere and prevent them from giving due weight to the evidence offered in open court, and thus the very facts which were of essential importance in the ancient form of the institution, became serious drawbacks to the action of the jury in its final stage of development. Numerous partial changes were made from time to time, until by statutes in the reigns of Anne, and of George II., the rule requiring the jurors to be summoned from the vicinage was abolished, and the selection was directed to be made from the county at large. And by a decision of the court of King's Bench, it was declared that if a jury gave a verdict upon their own private knowledge, it was an error; that they ought to have informed the court, so that they might have been sworn as witnesses. This brought trial by jury to its present perfected condition. As anciently a most careful scrutiny was made to select such men only as were familiar with the parties and the facts, the endeavor is now equally strenuous to obtain such alone as are absolutely unacquainted with the parties and the circumstances of the case, such as shall stand unbiassed by any preconceived opinions and prejudices.

§ 133. From this review it is plain that the trial by jury cannot be ascribed to any particular epoch or legislator. It was not entirely of Saxon origin, and much less was it an invention of Alfred. Commencing with the freemen's courts of the ancient Saxon as its germ, it has developed through many transitions, until finally, and in comparatively modern times, it presents its two distinctive elements, the strict separation of the law and the facts which characterized the old Roman procedure, and the admission of the people at large to the decision of causes, which distinguished the

Anglo Saxon and other Germanic courts. I do not suggest that the former of these elements was actually borrowed by the English from the Roman jurisprudence. Such a supposition would be in the highest degree improbable. All that was known of that system during the period of the growth of the jury, was confined to the final codes which closed the history of that law, and these compilations recognized such courts alone as were composed of magistrates. Nor can this feature be ascribed to the Saxons, for with them all questions, both of law and facts, were committed to the same persons. This element, as it exists in our jury, was rather the result of a necessity, growing out from the constantly increasing scope, extent, and intricacy of the law. As the people at large could not be skilled in the details of jurisprudence, that branch of a legal controversy embracing the principles and rules of the science, was at length confided to trained, professional judges. Thus while the consideration of the law was withdrawn from the jury, that of the facts was left to them, and the division of the subjects was effected.

§ 134. The details of the organization of juries in England and America are regulated by statutes, and vary somewhat in different states. The essential features of the system are, however, the same. From a large class of the responsible citizens of a county, including, perhaps, the freeholders or taxpayers, the sheriff chooses by lot a certain number, and summons them to attend upon the court. When any particular cause is to be tried, twelve persons are drawn by lot from the entire list summoned and in attendance, who are sworn to give a true verdict between the parties, and act as the jurors in the case. Ample powers are given to the parties in both civil and criminal trials to object to any juryman, who, either from personal prejudice or enmity, or from a previous knowledge and opinion of the facts of the case, would be deemed incompetent to act impartially. This power is exercised by open and pub-

lic challenges, which state the grounds of the objection, and when once interposed they must be determined before the person is accepted or rejected. In criminal cases, from a tender regard for the liberty or life of a citizen, the prisoner is entitled to a certain number of peremptory challenges, which absolutely exclude the proposed juryman, without the assignment of any cause of exception to him. The number of these challenges varies with the degree of the crime, and is regulated by statute.

§ 135. One feature of this method of trial merits special attention; that which requires the jury to be unanimous in rendering their verdict. This has a purely historic origin. The ancient Saxon courts decided by a majority of votes, but when the practice of terminating disputes by the consenting oaths of compurgators was introduced, the very nature of the institution required that the persons presented by a party to purge or support him should be unanimous. Naturally the same rule obtained when these compurgators were replaced by recognitors, although the reason for the provision no longer existed. The principle once adopted has continued as an essential part of the jury trial, successfully resisting all attempts at a change. The force of the argument against the practice of requiring unanimity in juries is overwhelming; no other deliberative bodies, whether legislative or judicial, follow it, and strenuous endeavors have been made by the best judicial writers in England to bring this national institution into a conformity with reason and good sense in this particular, but as yet all attempts at a reform have proved unavailing.

§ 136. Of the merits of the trial by jury as now administered, compared with that system which commits all questions of law and of fact to a court of professional judges, I do not purpose to speak at large. English and American writers have generally lauded the institution as the bulwark of English liberties, as an invincible barrier against the encroachments of arbitrary power. Yet it would be difficult

to point to any important occasion in English history, prior to the memorable trial of the seven bishops, where a jury has successfully resisted the most violent demands of the government in state prosecutions. They have generally, almost uniformly, been the passive instrument in the hands of judges and prosecuting officers, and have blindly registered their decrees. In the case referred to, the jury was sustained by the sanctity of the defendants, and the overwhelming and altogether unprecedented pressure from church and people of all classes, incensed against a king and court deservedly detested. It should be remembered that many of the noblest Englishmen who have innocently perished as the victims of partisan hatred, and tyrannical revenge, have been condemned by the verdict of a jury. Still while the jury trial lasts, the people have in their own hands the *power* of opposing the encroachments of government upon their liberties, and of controlling the trial and condemnation of criminals of every description. It cannot be supposed that this power will ever be voluntarily resigned.

§ 137. One marked benefit of the system, which has done much to distinguish English and American civilization from that of other countries is, that it affords a school for the more intelligent and responsible citizens in the principles and details of the municipal law. The effect upon the people at large, of the instructions from learned judges to the assembled juries from year to year, and from generation to generation, cannot be too highly estimated. No other means, in fact, are provided for communicating to the great body of the people any knowledge of the rules of the civil and criminal law, and of their practical working in controlling the daily business of life.

§ 138. Yet in England and America a growing disposition is evident to neglect the jury trial in civil causes, and to resort to other methods of deciding legal controversies. Late English statutes permit many classes of cases in the

higher courts to be submitted by the parties to the judge, or to referees or arbiters, and in the new county courts, where a jury is optional, it is found that the great majority of cases are tried without one. In America the same distrust is shown by similar provisions of statutes allowing judges and referees to be substituted for the old common law triers.

§ 139. The trial by jury is so completely a part of our judicial and governmental policy, that it is difficult for us to conceive of a society which has reached an advanced state of civilization without it. Yet the most enlightened nations of the European continent have little or nothing of the jury, and whatever some of them possess has been recently introduced, and is exceptional to the general course of their institutions. In 1791, the Convention established the jury trial in France, and it is still retained in criminal cases. It is, however, only a modification of the English jury. The government substantially controls the choice of its members. The jurors are twelve in number, and a majority determine the decision. Some other countries have followed the example of France, and partially adopted the jury.

## SECTION III.

### THE ORIGIN, HISTORY, AND JURISDICTION OF THE ENGLISH AND AMERICAN JUDICIARY.

§ 140. Having sketched the birth, growth, and maturity of the jury trial, I shall now in a general manner describe those judicial tribunals which have been the chief instruments through which the unwritten law has been called into being. These courts, like the jury, had an institutional origin, although they have been frequently and to an important degree remodelled by the supreme legislative and executive power in the state. Looking at the judicial institutions of the present day, we see them separated by a plain line of division into two classes; those in which the jury is

an essential part, and those in which it is not used. From our review of the history of the trial by jury, we shall easily perceive that the courts of the former class are the elder and the superior, and that they reflect in the most perfect manner the peculiar ideas of English jurisprudence. The others, although very ancient, and exercising jurisdiction over very important subjects, sprang up to meet peculiar exigencies, or to supply deficiencies in the more national system of jury courts. In the further consideration of the subject of this section, I shall proceed to sketch the origin and history of the superior law courts of England, and then to show how the American States and the Federal Government have adopted the essential features of the system.

I. *Of the superior Law Courts, or those which employ the jury as a part of their regular organization.*

§ 141. The germinal idea of the Anglo Saxon polity was that of local self-government, and this was shared in a great measure by the other Germanic nations on the Continent. In the time of Alfred, their institutions were definitely settled, although they are not to be ascribed to the inventive genius of that monarch, as has been done by many writers, but they were the natural products of more ancient ethnic principles. In his time the country had been divided into several counties or shires, and these were again subdivided into hundreds and burgs. To each of these divisions there were appropriate courts. The county court, or shire gemote was regularly held twice in each year; was presided over by the ealdorman or chief officer of the county and by a bishop, and was composed of the freemen or thanes of the district. The burg gemotes were held in each burg thrice in a year, and the hundred gemotes were convened every month. These latter were under the presidency sometimes of the ealdorman, sometimes of the gerefa of the county, an executive officer subordinate to the ealdor-

man. All these had similar jurisdiction over matters civil and criminal, and they even took cognizance of questions purely ecclesiastical, not those, indeed, touching the doctrines of religion, but those involving ecclesiastics and their property. The methods of organization and procedure in these simple courts were all the same, and have been sufficiently explained in the preceding section. Whether there was any appeal from the hundred and burg courts to those of the county does not appear, yet the latter were the most important tribunals, and cases of importance were brought in them, and were often adjourned thither from the others.

§ 142. Although these local courts continued for some considerable time after the Norman conquest, yet they gradually ceased to exist, or to exert any controlling influence on the nation. While these regular and stated assemblages of the free citizens for the discussion and transaction of local affairs have disappeared from England, they have been perpetuated in all of their essential features except the judicial, in some of the American States. The town meetings of New England and New York, and probably of other States, certainly represent the Saxon idea of local self-government. These stated convocations of the citizens of the little communities to regulate their own affairs, those which lie nearest about them, present a strong analogy to the primitive hundred gemotes, which were in fact, legislative as well as judicial.

§ 143. Besides these regular tribunals, the king's thanes, bishops, abbots, and other dignitaries who possessed large landed estates, called manors, had certain private or manor courts, as a part of their rights as proprietors. The presiding officer in them was the lord's bailiff, and the judges or peers, were the free tenants. This species of courts increased in power and importance during the supremacy of the feudal organization, and was continued after the Norman conquest, even leaving some traces behind to the present day,

but it never seems to have attained the rank in England which it reached on the Continent.

§ 144. None of these several classes of tribunals was the parent of the superior courts of law of England. We must look for the germ of these in the king's court or council of the Saxons, which was composed of the superior orders of king's thanes, together with the higher ecclesiastics, archbishops, bishops, and abbots. These persons were called the witan or wise, in Latin they were often denominated Principes or Optimates. There appear to have been in fact two councils. A certain number of advisers exalted in station always attended the person of the king, and formed the select council. More solemn assemblies, composed of a greater number of the optimates, were convoked under the name of witena gemote, or court of the wise. When assembled during the lifetime of the king, this council was presided over by the monarch. Its duties were legislative and judicial. As the depositary of the one power, it has grown to be the English Parliament; as possessing the latter jurisdiction it has resulted in the superior courts of the law. In the exercise of one class of functions, it assisted or advised the king in framing laws; it confirmed grants of public lands; it elected a king at the death of the reigning monarch. As a court of justice this king's council, whether special or general, was the only tribunal in which disputes between the king and his thanes, or among the latter themselves, could be considered and decided. Powerful criminals, who would overawe the free judges of the local courts were also tried here. At length it became the court of appeal from the county and hundred gemotes. During the Saxon rule, the council contained no special or professional judges. The bishops and other ecclesiastics, who composed a portion of its members, since they possessed all the learning and skill, as well in jurisprudence as in science and letters, were doubtless the principal advisers upon the law.

All of these courts contained, as an essential element, the germ which grew into the jury trial.

§ 145. This was the state of the judicial institutions of England at the time of the conquest (A. D., 1072). The Normans introduced into the civil polity of the kingdom the principle of the complete supremacy of the central government, which was wrought out under the ideas of feudalism, the king being considered as the supreme head of the nation, whence his vassals derived not only their property, but all other rights. In theory he was the source of legislation and of justice. In actual practice this doctrine was, perhaps, never fully realized, but the courts were constructed upon it. These changes were not made at once by William I., but were begun by him and continued by his immediate successors. The result was that the king's court or council gradually drew to itself by far the greater part of the judicial business of the kingdom, and, to accommodate itself to this increase, was changed in form from time to time, until, during the reign of Edward I, the superior law courts had become organized substantially as they have continued to the present day.

§ 146. During the reign of William I. (A. D., 1072–1087), the local Saxon courts remained as they had been left by the old dynasty, with the exception that the sheriff or vice count of the county presided, instead of the ealdorman. But in the king's council or court, an important modification or addition was made. William appointed a chief justiciary as its first judicial officer, who was, by virtue of his position, one of the principal advisers of the crown and viceroy. He was generally an ecclesiastic. Such was the commencement in England of a class of professional judges. Another innovation made by William, removed the jurisdiction over ecclesiastical subjects from the district courts, and confined it to the bishop in each diocese. From this reform have sprung those tribunals, which in England, and some of the United States, have control over the settlement

of the estates of deceased persons, and, in England, over questions of church discipline and property. The king's council, or curia regis, still preserved its legislative and judicial functions, united in the same body, nor were they finally separated until the reign of Henry II. (A. D., 1216–1270). It is probable, however, that, in the natural course of events, the business of adjudicating upon legal controversies fell into the hands of a few of the most influential and capable barons, who formed a part of the council, and that a majority of that body abandoned to them this important duty.

§ 147. William I. also established a tribunal, called the court of Exchequer, whose original business was simply to manage the revenue of the realm, and to determine such questions as might arise concerning it. It had no judicial functions, and was composed, not of judges, but of a small number of the chief executive officers of the administration. It was, in fact, what in modern times would be called a board, although in process of time it has grown to be one of the most important tribunals of the kingdom, having jurisdiction over a vast amount of civil business.

§ 148. During the reigns of the two subsequent monarchs (A. D., 1087–1154), no substantial changes were made in the national courts. The king's court had indeed drawn to itself a great amount of the business, so that an additional number of justices had been appointed, and it had acquired the right to review the decisions of all other courts of the realm. It still accompanied the king, being held from time to time wherever he happened to be in the country. This custom arose from the fact that it was still the monarch's advisory council, and its officers were required to keep near his person, and travel with him in his visits to different towns and cities. Naturally, as the business of the court increased, this its ambulatory character produced great inconvenience to suitors.

§ 149. In the reign of Henry II. (A. D., 1154–1188), the

curia regis had become overwhelmed with a vast accumulation of business. It had exclusive jurisdiction over all treasons, murders, homicides, arsons, and some other important crimes. To meet this demand upon the court, and to rectify the abuse of the expense and delay of suitors in attending it on its progress through the kingdom, and to increase his revenues, Henry II. introduced a new judicial element, which has continued to this day in England, and is the basis of the ordinary courts of America for the trial of causes. He divided the country into six circuits, each embracing several counties, and appointed itinerant justices to go from county to county, holding courts, and trying such causes as had arisen. It must not be supposed that the proceedings before these judges had anything of the order and method which characterize a modern suit at law. Indeed, a great part of their duties consisted in looking after and securing the fines and profits due to the king from his feudal vassals. In their strict judicial business, they rather compounded with criminals, and settled for offences by pecuniary mulcts, than enforced penalties for the prevention of crime. The institution of these judges gave the final blow to the hundred and other local courts of the Anglo Saxon policy. An appeal lay from their decisions to the king's court, which thus continued to hold a supervision over the entire system of the administration of justice.

§ 150. In the reign of John (A. D., 1194–1214), a change was effected which virtually settled the judicial policy of England upon its present basis. One of the provisions of Magna Charta, intended to rectify the abuse of the transitory character of the king's council, ordered that, "Common pleas shall not follow our court, but shall be holden in some certain place." The term common pleas in this connection, designates the judicial trial of all private civil suits, in which the cause of action was not some actual violence of the defendant. To carry out this article of Magna Charta, new justices were appointed before whom causes relating to

land and other civil matters were to be tried. This court, which was thus a branch of the regal council or curia regis, cut off from it and appointed to special duties, was fixed at the City of Westminster, and received the name of the court of Common Pleas, or as it is now generally known, the Common Bench.

There was left the curia regis proper, still having jurisdiction in criminal matters, and being the general appellate tribunal of the kingdom. In the course of time it acquired, by the use of convenient fictions, a jurisdiction over very large classes of civil cases.

§ 151. In the reign of Edward I. (A. D., 1272–1306) the law courts of England were settled upon their present basis. The old royal council, in regard to its judicial functions, was now replaced by three superior, and in some respects, coördinate tribunals, each composed of a small number of judges, and each fixed at Westminster. These were the court of Common Pleas, the king's court, called the court of King's Bench, and the court of Exchequer. The primitive jurisdiction of the first extended only to purely civil causes, that of the second was over crimes and claims growing out of personal violence, while that of the third pertained to the details of the public revenue. Edward I. also remodelled the system of itinerant justices upon a plan which continues in operation to the present day. Until the time of this change, the causes which had been commenced in the superior courts, were tried before them at Westminster, and parties were subjected to the great expense and trouble of a journey from all parts of the kingdom, with their witnesses, to that city. To remedy this inconvenience, measures were adopted by which all cases could be tried in the county where they arose. For this purpose the king issued special commissions to judges called judges of assize, empowering them to go into each county and try such civil suits, and hear and determine such criminal charges as were ready. The persons usually appointed for this purpose are the

judges of the three superior courts, and their peculiar office ceases when the duties have been once performed. The assizes are held at least once in each year in every county, and to them the juries are summoned. They are not courts continually existing, but are yearly organized, perform their functions, and end, being in fact offshoots, or aids of the superior courts at Westminster. A cause arising in any particular county is commenced in one of the three courts at Westminster, for example, in the common pleas; it proceeds until it is ready for trial; an assize judge comes within the county at the appointed time, and holds a court in which the matter is tried before a jury; after their verdict the case is remitted to the common pleas at Westminster, to be proceeded with as the situation of the case may demand. Whatever legal questions may have arisen on the trial are argued before all the judges of that court, and decided by them, when the final judgment is rendered.

§ 152. I shall now describe how these several superior courts gradually acquired jurisdiction over the subjects which are continually brought before them. As has been stated, the court of common pleas originally had the power to hear and decide all controversies respecting land and other civil questions. This jurisdiction it still retains unimpaired. The court of King's Bench, in like manner, was the great criminal tribunal, and conservator of the peace of the realm. This function has not been abridged or shared with any other court. Its power in regard to civil actions has increased step by step, through the means of harmless but ingenious fictions, which the judges have freely used to extend their jurisdiction. The duty of conserving the peace, naturally involved the power to hear and determine all actions not criminal, which were brought by a person to obtain damages for acts of direct violence to his person or property. By a peculiarity of the English procedure, which will be explained in a subsequent section of this chapter, many classes of civil actions, although not

involving any actual violence of the defendant, were, by a fiction, supposed to be based upon a forcible invasion of the plaintiff's rights, and were so treated. These were also brought within the increasing jurisdiction of the King's Bench. It was decided that when a person was actually in the custody of the court, having been arrested upon its process, no other tribunal could interfere, and entertain suits brought against him. To prevent a failure of justice, the King's Bench must, therefore, permit any action to be brought before it, against a defendant thus under its control. In taking the next step, the court greatly enlarged its jurisdiction, by the employment of a glaring fiction. Although a defendant was not actually in custody, he was assumed to be, and the assumption could not be contradicted. The plaintiff alleged in his pleading at the commencement of the suit, that his adversary was in the custody of the court, and the latter was not allowed to deny the statement. In this manner, the King's Bench, by its own acts, obtained a kindred jurisdiction with the common pleas over the private legal controversies of parties.

§ 153. The progress of the court of Exchequer toward its ample powers was even more entirely founded upon fictions. When created, this tribunal was only an executive board, composed of leading barons chosen from the royal council. Their duty was to contrive and carry out measures to systematize and increase the public revenue. Naturally they were led to consider and decide the legal questions connected with the fiscal matters brought before them, and thus there commenced a judicial function. In the progress of time, the king's debtors were sued in this court, and it finally acquired an extended range of civil jurisdiction nearly equal to that of the Common Pleas and King's Bench, by allowing actions to be brought before it by persons who alleged that they were debtors to the king, and were deprived of their ability to pay, through the wrongful acts of the defendant which were the occasion of the suit.

At first this power was probably assumed only when the plaintiff's statement of his indebtedness was actually true, but it was soon extended to all cases, and the allegation became a mere form which could not be contradicted.

§ 154. I have thus stated the origin and briefly traced the progress of the three superior courts of original jurisdiction in England, through whose judicial action the unwritten law has been built up to its present condition. Of their special powers, in addition to their general duties, in hearing and determining suits, it is not my purpose to speak, except to refer in its proper place to the important function of issuing writs of habeas corpus. Each of these tribunals consists of a chief justice, and several assistant or puisne justices. Those of the court of Exchequer are termed barons. Over them all are placed two courts of review; one, called the court of exchequer chamber, is composed of the judges of the two courts, other than the one whose judgment is reviewed; the other is the House of Lords, the highest tribunal in the kingdom, which thus retains the vestiges of that judicial power which belonged to the ancient council of the king.

§ 155. This short historical sketch clearly shows that the civil and criminal business of the kingdom, which, in the Anglo Saxon constitution, was distributed among the local courts of the counties and hundreds, has been drawn into the imperial tribunals of the central government. Within a few years past, a partial return has been made to the old idea, by the organization of county courts, for the trial of minor causes, which are held by a single judge. The procedure in them is simple, and divested of forms, and the jury is optional with the parties.

I shall now describe in a general way, the corresponding Law Courts of the United States.

§ 156. The Courts of the United States were not, like those of England, the result of generations of growth and adaptation to the increasing wants of the communities.

They were the creatures of the constitutions or statutes of the individual States, and the Federal Government, fully organized at once by the fiat of the legislature. Still we had all the experience of our English ancestors to borrow from, and the English models to copy, and have, in all essential particulars, conformed our higher tribunals to these patterns.

§ 157. I cannot, within the limits of this work, give any detailed account of the judicial systems of the several American commonwealths. A general outline will suffice for the whole. In each of the States there is a superior court, possessing an original general jurisdiction in civil and criminal matters, composed of three or more justices, and clothed with most of the important powers of the three superior law courts of England. Connected with this, and in a measure subordinate to it, either as actual branches, or as distinct tribunals, are the courts held at stated times in each county or district for the trial of causes by a jury, which are analogous to the English assizes. These trial courts, as they may be termed, are in most of the States presided over by different judges from those which form the superior court, and from them appeals are brought to the latter. In many of the States, there are other inferior tribunals in each county, which have jurisdiction over civil causes of a limited amount, and over the lesser grades of crimes. In some of the commonwealths, this system is perfected by an appellate tribunal, designed exclusively to review the decisions of the superior courts of original jurisdiction. Frequent changes have been made in the judiciary of the different States, as the rapidly increasing business demanded a more extensive system, or as the people themselves have been led, by our national feeling of unrest, to prefer new things to the old.

The foregoing will suffice for a description of the law courts of the various American States. It will be seen that they include, under some form, a bench of judges, appointed

by governors, or elected by the people, whose functions are to decide the law in a formal and solemn manner, and sub ordinate trial courts, in which a jury, under the presidency of a circuit judge, determines the questions of fact.

§ 158. The organization of the Federal courts of the United States demands a more particular description. In the National Constitution it is declared that "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish." * * * "The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and the citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof, and foreign States, citizens, or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction. In all the other cases above mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as Congress shall make."

§ 159. Acting under these general grants of power, the United States Congress have organized the following courts, which now exist as the Federal judicial system; the Supreme Court, the District Courts, and the Circuit Courts. The Supreme Court is now composed of one chief justice and eight associate justices. Although they have original jurisdiction in certain cases, they are practically an appellate tribunal only. They hold one term in each year at the City of Washington. Their business consists almost entirely in

hearing and deciding cases, brought to them for review from the Circuit Courts of the United States, from some of the District Courts, and occasionally from the highest court of an individual State.

§ 160. The Supreme Court of the United States has always borne a very high character as a learned and able tribunal. As it derives its jurisdiction entirely from the constitutional provisions cited above, the cases brought before it do not present so large a variety of subjects as those which engross the attention of the superior State courts. The great amount of legal business transacted by the people of the United States finds its way through the latter tribunals; they represent more completely the courts of England. Cases relating to the ordinary transactions of mercantile and commercial business cannot be brought before the Federal courts, unless the parties are citizens of different States, and such instances are, of course, comparatively rare. Practically, the great majority of legal controversies, which find a hearing before the national judiciary, are those arising under the laws of the United States, those belonging to the admiralty jurisdiction, and those between citizens of two different States. The latter class may involve any kind of question, upon any subject whatever. It is not the transaction, but the citizenship of the parties which confers the jurisdiction. Thus we find disputes concerning land, personal property, contracts, commercial and mercantile transactions occasionally discussed and determined by these courts, and their decisions upon these subjects have always commanded great respect, not only in the United States, but in Europe, as expositions of those branches of the law which contain the same general principles throughout the civilized world. Of the admiralty jurisdiction, I shall speak in another section. Those cases arising under the laws of the United States, which form the most numerous class brought before these courts, are, from their nature, to a certain extent special, involving more often a mere construction of

statutes, than any general legal principles. Some of the most important divisions of causes in this branch, are those relating to patent rights, arising from the patent laws; those relating to the revenue, arising from laws imposing duties and imposts, and regulating the acts of collectors of ports; and those relating to the public lands which have been disposed of, or otherwise controlled by acts of Congress. The most important and peculiar function of the National Court is exercised in deciding great constitutional questions, it having the power practically to avoid a law, either of Congress, or of a State Legislature, which it shall declare to infringe upon the provisions of the Federal Constitution. No other National Court of Justice seems to possess this exalted jurisdiction to which, if not in theory, yet in reality, both the executive and the legislative departments must bow. By far the most interesting passages in the history of the Supreme Court, have been those where great political questions, involving different constructions of the organic law, have been discussed and decided. It has been in these that the great judges, Marshall, and Story, and Taney, and the profound jurists, Webster, Wirt, Pinckney, have exhibited their highest powers, and shone with transcendent splendor.

§ 161. The District Courts of the United States are held by a single judge, and are confined to separate districts, generally coterminous with the States. Their jurisdiction is original, and is quite varied. Much of their business is carried on without a jury. In these courts the offenders against the criminal laws of the United States are arraigned and tried, of course before a jury drawn from the citizens of the district.

The Circuit Courts are partly an intermediate appellate tribunal between the two extremes of the judicial system, and partly are courts of original jurisdiction. The greater part of the territory of the United States is divided into nine circuits, each containing several States. In each a Circuit

Court is held, composed of one justice of the Supreme Court, and the judge of the district in which the court sits. In it are brought suits relating to patent rights, and those between the citizens of the different States, both classes often requiring a jury for their trial; also certain criminal cases, and others which I need not particularize. They have also the general power to review the judgments and decrees of the District Courts. The limits of this work do not permit me to speak in detail of the power of review of the Supreme Court over the decisions of the Circuit Courts. It is sufficient to say that almost all cases may be taken from the inferior to the Supreme Court, and there finally decided.

§ 162. The National courts are thus seen to possess a varied, and, in some respects, a peculiar jurisdiction. As regards some questions, as, for example, those relating to patents, to admiralty, and to crimes against the United States, this jurisdiction is exclusive; the State courts cannot entertain such causes. In respect to another large branch of its business, especially that founded upon the citizenship of the parties, the jurisdiction is shared with the courts of the several States.

I shall now proceed to describe those courts of England and America, which transact their judicial business without a jury, committing all questions, both of law and fact, to the official judges.

II. *The Courts of Equity.*

§ 163. The chief of these in England is the Court of Chancery, of which the presiding judge is the Lord High Chancellor. The office of the chancellor is very ancient. It existed among the Saxons, among the Franks on the Continent, and among the Normans after the invasion. The chancellor was a high dignitary immediately connected with the king's person, forming one of his select council, but possessing no separate judicial functions. He was originally chosen always from among the ecclesiastics, and it was not

until in the reign of Henry VIII. that the custom of appointing lay chancellors became permanent. His judicial duties were of gradual growth. The origin and progress of the custom, until it developed itself into the fully organized court possessing peculiar powers, proceeding by methods different from those of the law courts, and producing a distinct body of rules denominated equity, will be more appropriately given in a subsequent section, in which I shall treat of actions and the procedure of courts. It is sufficient now to say that the tribunals administering the law by means of juries were found inadequate to meet all the demands of justice, even in quite ancient times. Many questions were arising which did not fall within the established rules of the law, or which, if decided by them, would work palpable wrong, and such matters in theory, and at first in practice, were reserved for the king himself to determine. The monarch entrusted this judicial function of his kingly office to the chancellor, who was the keeper of his great seal, and the adviser of his conscience. Thus the chancellor began to judge, and continued, until his court became as firmly established as those of the King's Bench, Common Pleas, or Exchequer.

§ 164. In addition to his judicial functions, the chancellor in England has important political and administrative duties, which it is unnecessary for me to dwell upon. He is the first lay subject in the realm, is president of the House of Lords, and is always a leading member of the administration in power. The judges of the other courts hold their seats during good behavior, but he retains his office by a frail tenure. Custom has established the rule that the chancellor changes with every revolution of dominant political parties.

He is assisted in his judicial labors by several subordinate judges, the master of rolls, the vice chancellor of England, two other vice chancellors, and by two judges of appeals in equity, created by a modern statute. From his decisions an appeal is permitted to the House of Lords.

§ 165. Although these judges of the court of chancery pronounce upon the law and the facts of a case without the intervention of a jury, yet they are assisted in the onerous details of much of the business before them by a class of semi-judicial, semi-clerical officers, called masters, who do much of the actual investigation of controverted facts, and report their conclusions to the judge, who may adopt or reject them.

§ 166. *Equity Courts of the United States.*—Some of the American States have no tribunals with equity powers; in most, however, the ordinary superior courts entertain both suits at law and in equity, adopting alternately the peculiar procedure and rules applicable to the two classes of jurisdiction; while in a few there is a separate court of chancery. In the State of New York, until the year 1846, the courts of equity were distinct from those of law, and consisted of a chancellor, and several vice chancellors. The court was thus formed directly upon the English model, but the judges possessed no other than judicial duties, and held their offices during good behavior. The States of New Jersey and South Carolina still retain the separate court of chancery, with its peculiar organization, procedure, and doctrines.

§ 167. The District, Circuit, and Supreme Courts of the United States, may act either as law or equity tribunals. This method, which is general with us, only clothes the judge with two distinct capacities, it does not unite the jurisdictions. He sits in one cause as the judge of a law court, following the rules of that forum, and trusting to a jury to decide all questions of fact in issue between the parties; in another suit, he administers justice according to the peculiar doctrines and by the methods of the English Court of Chancery. This form of organization has some great advantages over that of the English Constitution. It prevents a multiplicity of courts, and requires that the judges should be familiar with both systems of legal remedies, and should, therefore, be more competent to define

their limits, and apply them to particular cases. In England a commencement has been made of a union between the two classes of jurisdiction, by allowing the superior courts of law in certain cases to entertain equity suits or defences, which is an innovation entirely in conflict with their whole judicial theory. This step may result in an entire blending of the powers and functions of the two jurisdictions, and their committal to one court in England, as in the United States.

III. *Ecclesiastical Courts.*

§ 168. I have already stated that under the Saxon rule, the courts of the shire and of the hundred, acted under the double presidency of a state officer and a bishop, taking cognizance of matters ecclesiastical as well as civil, and that William I. soon broke through this simple constitution, by removing the bishops from these duties, and entrusting all spiritual jurisdiction to them alone. Hence have arisen the ecclesiastical courts as distinct tribunals. In theory each bishop and archbishop is a judge within his diocese, or province; in practice they delegate their functions to lay deputies. The most important ecclesiastical courts of the kingdom are those of the provinces of York and Canterbury.

§ 169. The peculiar jurisdiction of these tribunals is divided into two branches. The one relates to subjects directly connected with the established church, in its character of a state institution. It embraces suits in reference to church lands, and edifices, and parsonages, the collection of tithes, and the enforcement of discipline either against laymen or clergymen.

§ 170. The other branch is of much more general importance, both as it affects the municipal law, and the rights and interests of the whole people. In early times the clergy were engaged in a constant struggle with the nation to obtain administrative and judicial power. They so far suc-

ceeded as to acquire control over many legal questions relating to marriages, and the disposition of the estates of deceased persons, under the idea that marriage and death were of so sacred and solemn a nature as to impress a certain spiritual character even upon the civil accessories which surround and accompany them, and that the judicial investigation of all topics connected with them belonged to the church. The right thus anciently acquired by the ecclesiastical courts, has remained with them to the present day, and gives them by far the most important part of their duties. It includes the granting of divorces, the proof of last wills and testaments, the appointment of administrators and the supervision of their official acts, and the distribution of the personal estate of deceased persons. A recent statute has taken away the power to grant divorces, and committed it to a new court, expressly created for the hearing of matrimonial causes.

§ 171. In many of the American States, that portion of these powers which relates to wills, and the personal estates of the dead, is lodged in special tribunals, which are in this respect the successors of the English ecclesiastical courts. In New York, and some other States, the judge who has charge of these subjects is called the surrogate, in others the judge of probate, or the ordinary. Both in England and America these officers act without a jury, disposing themselves of all the questions involved in a litigation.

IV. *Admiralty Courts.*

§ 172. In England and in the continental states of Europe, there has long been a peculiar class of tribunals which have cognizance of controversies, and suits directly arising from matters connected with the navigation of the ocean, and which are known in our law as admiralty courts. In most of these countries, these courts have a widely extended jurisdiction, but in England, because their methods are different from those of the ordinary courts of law and dis-

pense with the jury trial, there was at an early day a strong feeling of jealousy towards them among the judges of the superior courts, which resulted in a partial curtailment of their powers, and confined their jurisdiction to a comparatively few maritime questions arising upon the high seas where the tide ebbs and flows. This court in England is held by a single judge. The Constitution of the United States empowers the courts created under it to have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, and under this grant of power, Congress has committed the original jurisdiction in these matters to the United States District Courts, from which appeals can be had to the Circuit Courts and the Supreme Court. In construing this constitutional provision and the powers of the admiralty courts under it, there has been a long and sharp dispute among the judges. One class would interpret the constitution according to the restricted use of the admiralty jurisdiction adopted in England, while the others would allow to these courts all the powers which are granted to them by the maritime nations on the Continent. Thus, adopting at an early day the English rule, the Supreme Court determined that admiralty jurisdiction in the United States extended only to cases arising on tide waters. But this restriction has been found incompatible with the prosperity of our great inland commerce, and by a late decision this rule has been abrogated, and it has been held that the great lakes, and navigable waters connecting them, are also within the scope of the law, as administered by the courts of admiralty. In short, the jurisdiction of these courts has been steadily increasing, and is approximating that of the maritime tribunals of the nations of Europe, rather than that of the Admiralty Court of England.

The subjects contained within this jurisdiction are divided into two general classes, those arising from contracts, and those arising from torts or wrongful acts. The first class is limited to claims and services purely maritime, and

touching rights and duties appertaining to commerce and navigation. In it are included the claims of persons for repairs and outfits of ships belonging to foreign nations and other states; claims arising on bottomry bonds, or securities on the vessel itself, given for money lent to ships in a foreign port to relieve them from their distresses; claims for surveys of ships damaged by perils of the seas; claims for pilotage on the high seas; claims of seamen for their wages; claims arising from contracts of hiring or freighting ships, and the like. In the second class are included claims arising from civil wrongs and seizures done on the waters; from assaults and other personal injuries; from collisions between two vessels; from illegal seizures and depredations of property, and the like.

The courts of admiralty have also a special jurisdiction, existing in time of war, to hear and decide all matters of "Prize," arising from the seizure of merchant ships by the armed vessels of the United States. According to the law recognized by all civilized nations, the seizure of the merchant ships of an enemy, or those of a neutral when violating the laws of war by carrying articles contraband of war, or by running a blockade, is not absolute and final, until the character and nationality of the vessel, and the circumstances and object of the voyage, have been investigated and decided by a court of admiralty. If the result of such investigation and decision be in favor of the captors, the ship is condemned, forfeited, and sold.

§ 173. The procedure of the courts of admiralty is very different from that of the courts of law or equity. Two kinds of actions may be brought, those against the person (in personam) and those against the thing (in rem). In the former a suit is commenced against a known person as defendant, to maintain and enforce some right. In the latter the suit is brought directly against the vessel, which is at once seized, and public notice is given, so that the owners or persons interested therein may intervene and defend the

suit. It is this latter species of actions which particularly distinguishes the admiralty procedure from that of other courts, and gives it such a superiority in its treatment of property so movable as ships and other vessels on the ocean. In the strict admiralty practice, the evidence is taken, reduced to writing, and submitted to the judge, who decides all the questions of law and of fact, without the aid of a jury.

## SECTION IV.

### OF THE MANNER IN WHICH LEGAL CONTROVERSIES ARE BROUGHT BEFORE COURTS, AND BY THEM TRIED AND DECIDED.

§ 174. It is evident that, to insure promptness and accuracy on the part of judicial tribunals, there must be some method, order, and precision in presenting to them the matters in difference between suitors. More than this, the regular and scientific development of the whole body of the municipal law, through the official acts of magistrates, is most intimately bound up in the forms of procedure used by them. No national jurisprudence has grown to be comprehensive, enlightened, and just, without the aid of these conventional, and, to a certain extent, arbitrary instruments. While the English law was for a long time bound up and hampered in its progress by a too nice regard for the technicalities of form, the opposite extreme of disregarding all forms, and permitting each suitor to disclose his complaint or defence in such manner as pleased him best, would be destructive of all endeavors to reduce the law to a compact and digested system, and in fact could only have existed among the rude Saxons and Franks at their folk courts. There we find the law stripped of all forms of procedure; the freemen are gathered in an assembly; the plaintiff tells his story; the defendant publicly rejoins in person, or, as in a case already cited, communicates in private to messengers; neighbors and friends disclose their knowledge; the assembly decides, not in reference to any fixed rules, but

according to vague neighborhood customs, and imperfect ideas of justice, and the result is written down in the parish register, or copy of the gospels of an adjacent church. This is the picture of judicial process in the earliest stages, before there has been any advance, however feeble, toward a real municipal and scientific jurisprudence.

§ 175. A casual survey of the legislation of different countries will show, that, after the first steps are taken, and the progress toward final perfection is fairly entered upon, but before the legal ideas have yielded to the influence of general ethical principles, the procedure is distinguished by a strict adherence to forms, often in the highest degree arbitrary. At more advanced stages this arbitrary character and technical nicety of legal actions gradually gives way; the substance, the merits of the dispute, are more regarded by the courts; the deviations from prescribed formularies are passed over. Finally, when the jurisprudence has attained a position where the greatest possible weight is given to considerations of abstract right, and the least to those merely historical and institutional, when the aim of the law is to rule the actions and intercourse of citizens by maxims of pure morality, the judicial procedure will have retained only so much of form as is indispensable to the orderly and speedy administration of justice. A historical sketch of the legal processes of our own courts will show that the earlier stages of this development have been passed through, and that in England and America the last has been commenced. Not that perfection has been reached; not that we are in the golden mean, for doubtless many time-honored methods must yet be discarded, and perhaps some new expedients lately adopted will introduce confusion and uncertainty, far outweighing in evil the good effects of their apparent simplicity.

§ 176. Before giving any account of the forms of action, pleading, and proceeding, which have grown up in the English and American courts, and which involve a state-

ment of the origin of many legal principles and doctrines, I shall preface the subject by a brief and summary description of the Roman procedure, which will illustrate the preceding observations, extending as it does through the whole life of a national jurisprudence, from the rude origin to the enlightened, comprehensive, and perfected close.

I. *The Roman Procedure.*

§ 177. In the earliest periods of the Roman common wealth, extending to about the time of the Twelve Tables, the administration of justice had not been completely separated, as afterward, between those magistrates who decided the law, and the lay judges who pronounced upon the facts. All legal knowledge, and especially that of the forms of action, was confined to the patricians, from which class the magistrates were chosen. The proceeding by which a legal right was judicially enforced was called legis actio, an action at law. Of these there were five distinct kinds, 1, sacramento; 2, per judicis postulationem; 2, per condictionem; 4, per manus injectionem; 5, per pignoris captionem. These actions were intensely technical; the slightest deviation from the prescribed forms defeated the recovery. They could only be commenced upon certain consecrated days, which were solely known by the augurs. In regard to the actual steps or proceedings in each, but little is known. The first was the most ancient and common. The second was characterized by the demand for a judge (judex) to decide the facts. In the fourth the defendant was arrested, and could be released only by furnishing securities. If the first action related to the title or ownership of some particular thing, the trial was prefaced by an inquiry to determine with which party the possession of the subject matter should remain during the litigation; and when the contest involved the freedom or slavery of an individual, this preliminary question should always be decided in favor of liberty. The glaring illegality of the act

of the decemvir Appius Claudius, in the story of Virginia, was that he violated this salutary rule, and awarded the possession of the maiden, during the pendency of the suit, to the plaintiff. The actual merits of the case were never reached.

§ 178. The action was commenced by no form of process or official summons. The plaintiff personally ordered the adverse party to appear before the magistrate, and, upon his refusal to attend, might drag him thither by force. The judgment in most cases was in the nature of an award of pecuniary damages. In an action brought to recover loaned money, the plaintiff was required to wait twenty days after the decision, in which the debtor might pay the amount of the judgment. Upon the failure of the defendant to perform his obligation at the expiration of this period, the plaintiff summoned him before the magistrate, and called upon him to furnish responsible sureties for the payment of the claim. This failing, he might thrust his debtor into a private prison, and there confine him for two months, bringing him out three times into some public place, to give opportunity for security to be offered. At the end of this limitation all rights of the defendant ceased, his goods could be taken, and himself sold into slavery in satisfaction of the plaintiff's demand. The barbarous provision existed, that, in case several judgment creditors had claims against the same debtor, they might divide his body between them.

§ 179. During the period commencing with the Twelve Tables, the Roman law began its onward march of improvement, through the aid of judicial construction and decision. The patricians as a body ceased to be the sole depositaries of legal learning. Jurisprudence itself was no longer bound up in a close alliance with religion. The creation of the magistrates called prætors, exerted a marked and constantly increasing influence upon the development of the science, until it reached its most flourishing era. Much of this improvement was effected through the judicial machinery

and forms of action invented by the prætors, and to fully understand this most interesting branch of legal history, which has so close a relation with similar modifications of the English law, it is necessary to anticipate a little some of the statements which more naturally belong to a chapter exclusively devoted to the Roman law.

§ 180. The foundation of the Roman jurisprudence was the lex civilis, or law applicable to the citizen. Its rules were positive, formal, unyielding, and arbitrary, being the exponents of the peculiar type of the primitive Roman civilization. Sprung from customs and unwritten usages, and modified or increased by statutes and the opinions of jurisconsults who labored to preserve it in its purity and strictness, it afforded no scope to the magistrate for the exercise of discretion or equity, to evade, soften, or alter any of its provisions. As long as the judges were bound by its fixed rules, their decisions must be yea, yea, nay, nay. But this iron framework of legal doctrines, would not long suffice for the expanding life of the Roman people. The prætors must legislate to meet new cases, and to correct old abuses. While such legislation departed from the old dogmas, it was still built upon them as a basis. It did not violently oppose the established system, but rather struggled to lead it into new and necessary channels. It gradually introduced the ideas of abstract right, which the Romans called *jus gentium*. The additions thus engrafted upon the ancient stock were known as the prætorian, or honorary law, and came at length to constitute the great body of the national jurisprudence, in its age of most philosophic culture. A careful examination of this development, and a comparison between it and the analogous work done by the English courts of chancery, and of law, afford a most interesting subject of contemplation to the legal student, and I propose to illustrate this instructive topic more at large in a subsequent chapter.

§ 181. The transitions and additions thus made by the

prætors, were not introduced by any direct acts of legislation, repealing what was established, and substituting the new; they were rather quietly accomplished by cautiously admitting suitors to new forms of action in prosecuting their rights and remedies, when by previous forms these rights would have been unrecognized, and the remedies unattainable. The employment of convenient fictions was very common to facilitate this beneficial design, such as the feigning a party to be a Roman citizen, when he in fact was not.

§ 182. The occasion if not the cause of the first modification of the procedure, was the publication by one Cnæus Flavius, a plebeian and secretary of Appius Claudius Coccus, of the calendar of judicial days, upon which alone actions could be commenced, and of the book of legis actiones, or forms of procedure before the magistrates. Before this epoch, the knowledge of these all important subjects was carefully retained by the patrician augurs. A subsequent disclosure of the same character made by the Ælianian Law completed the destruction of the old machinery of legis actiones, which I have already described, and they, with all their arbitrary and oppressive technicalities were abandoned. In their place was substituted the proceeding by *formulas*, although the term action is still retained by writers on the Roman Law.

§ 183. The formula commenced with a part called the "Demonstration" (demonstratio), which contained a short statement of the plaintiff's cause of action. This was followed by the "Intention," (intentio), which was a more precise and formal setting forth of the claim and the facts upon which it was founded. Following the intention, the answer of the defendant was placed, which might be a simple denial of the plaintiff's allegations, and would only require him to prove them. In many cases, however, the party prosecuted was permitted to offer a form of defence called an "Exception" (exceptio), which, admitting the truth of the statements in the intention, disclosed other facts

showing that the plaintiff ought not either in strict law or by the principles of justice, to succeed in his action. As an example of the first case, the defendant might plead in his exception, that the obligation had been cancelled by payment; as an illustration of the second, he might charge that the contract though regular in form, and still subsisting, was obtained through fraud or violence. The plaintiff in turn could meet this exception, if necessary, by a pleading called the "Replication" (replicatio), which alleged other circumstances, which were claimed to destroy the effect of the defendant's answer. The latter replied by a "Duplication" (duplicatio), and thus the pleadings might be extended, until a point was reached, where an affirmation on the one side was met by a direct denial upon the other. This termination of the allegations of the parties, which the English and American procedure calls the joining of issue, the Roman lawyers denominated the *litis contestatio.* After the plaintiff and defendant had thus met in a definite issue, the next division of the formula was the "Adjudication" (adjudicatio), or order sending the cause to the judge (judex) for decision upon the facts and final judgment, and the whole closed with the "Condemnation" (condemnatio), or interlocutory decision, which settled the rule of law, and directed the judgment to be rendered either for the plaintiff, upon the proof of the facts averred by him, or for the defendant, upon the failure of the complainant to maintain his case, or upon the establishment of the defence which the prætor had allowed to be incorporated in the exception. All the proceedings were actually written down by the prætor, or his secretary, and it is impossible not to see the striking similarity between these methods and those which have prevailed in the English and American courts of law. With the "Condemnation," the magistrate's duties ceased, and the cause now ready for trial was remitted to the judex or arbiter, who proceeded with it in the manner I have already described.

§ 184. These pleadings were common to all the actions which were allowed by the ordinary jurisdiction of the prætor. The element which differenced the classes of actions, consisted in the facts which the magistrate allowed to be incorporated in the *intentio*, as the basis of the relief claimed, or in the *exceptio*, as a ground for defeating the recovery.

§ 185. From the earliest period actions were divided into two generic classes, real and personal. Real actions (actiones in rem) were those by which the plaintiff sought to establish a title or ownership to some particular thing. Personal actions (actiones in personam) were brought to enforce some legal obligation resting upon the defendant, which might arise from contract, or matters analogous to contract (ex contractu, or quasi ex contractu) or from a wrong, or matters analogous to a wrong (ex delicto, or quasi ex delicto). These two divisions had reference to the object or purpose for which the action was brought, the subject matters involved in it, and the remedy prayed from the court. In personal actions the remedy was generally an award of damages.

§ 186. At the earliest periods all contracts, and all actions to enforce them, were founded upon the unbending provisions of the *lex civilis*. Originally then, all the actions coming within the prætor's jurisdiction were those allowed by the primitive law, and for which there were prescribed and well-known formulas. Such actions were said to be "of strict right," (stricti juris). The plaintiff could only state some obligation known to the law, in the technical manner authorized by the ancient practice. The defendant on the other hand could only interpose such a defence as was specially appropriated to the peculiar obligation stated in the *intentio*, and the judex could not go beyond these limits in his decision.

§ 187. All this would answer for the civilization of the Romans during the earlier periods of the republic, with no

commerce, manufactures, arts, letters, or philosophy, but only war and agriculture as the occupations of the people. But with the successful wars and continual conquests, a vast influx of foreigners, now subjects of the state, poured into Rome, bringing with them their own national customs and ideas of law and right. Intercourse with these new residents and with the inhabitants of the provinces, and the growing commerce incident upon the flourishing and expanding condition of the commonwealth, not only mitigated the stern notions of the citizens, but also furnished occasion for new varieties of contracts and obligations, and these in time demanded new forms of action and remedy. The organs of the *lex civilis*, the assemblies of the people, the senate decrees, and the opinions of the jurists, to a certain extent yielded to this influence, and effected some changes in the character of legal rules; but as popular assemblies and legislative bodies can never keep that even pace with the gradual advance of commerce and of civilization, which shall ensure a steady growth of the law suited to the wants of the body politic, it was left to the magistrates to introduce most of the improvements both in doctrines and in procedure which were demanded by the prosperity of the State.

§ 188. At what precise date most of these judicial relaxations of the old sternness were made, cannot be stated. One of the most important consisted in softening the rigor of the actions *stricti juris*, and taking a class of legal obligations entirely out from them, and forming a new species of action for their enforcement. The prætor began by permitting the defendant to plead facts in his exception, which, although they did not form the appropriate defence recognized by the existing law, yet showed that it would be inequitable to compel the performance of the obligation. These defences were at first not absolutely forbidden by the ancient rules, they were only unprovided for. The exception being admitted by the magistrate into the formula, the

judex was compelled to notice it in his decision. The innovation was originally made in extreme cases, to prevent plain injustice, but it grew to be a general custom. The new class of actions which grew out of this relaxation, were called *bonæ fidei.* They were used to enforce obligations which were mutual in their nature. They required no special exception in the formula, but the prætor added the direction that the judge should do what was right between the parties. The judex, or arbiter as he was then called, following this general command, took into account all the circumstances which would either increase or lessen the defendant's liability, having regard to considerations of good faith and equity. Thus he would allow a counter claim arising out of the same transaction in favor of the defendant, or interest on his demand to the plaintiff, or would declare the obligation void if it were tainted with fraud or force, even though these two facts had not been relied upon by the pleadings. Thus we have arrived at two important divisions of actions founded on contract those *stricti juris*, and those *bonæ fidei.*

§ 189. In pursuance of the judicial policy of enlarging the scope of the municipal law through new and adequate remedies, the prætor made another invasion upon the arbitrary forms of the ancient lex civilis. Cases would arise unprovided for, either by the letter, or by the spirit of the ancient rules. With those not exactly within the letter, but yet within the spirit, his task was easy and natural. The end was attained by enlarging the recognized actions and remedies, and building up others, not original in principle, but more comprehensive and extended in detail. Such were actions *præscriptis verbis.*

§ 190. But the magistrate was called upon to adopt a more decided approach towards actual legislation. Complications began to arise from the intricacy of business, and from the increasing disposition of owners about to die to divert their estates from the well-known and simple rules

of descent, which presupposed actions and remedies not only unprovided for, but actually opposed by the letter and spirit of the old law. Here came in play the peculiar function of the prætor (which, by its extent and importance has quite hidden his other acts in developing the law), that of doing *equity* between the parties, when the strict rules of the ancient code would have worked manifest injustice. He was, indeed, to use English terms, a law judge and a chancellor; he introduced and built up a system of equity interfusing the law, and, at the same time, he moulded the stern doctrines of the civil law itself into a closer agreement with ethical principles and the wants of the passing ages, until finally both were merged and combined into one systematic code. He did this by inventing and using equitable actions, called *actiones in factum*, characterized by no particular forms, each depending upon its own particular circumstances. All this was not the work of a generation nor of a century. Thus one of the most important of these equitable actions was not introduced until the reign of the Emperor Nero, that which was used to enforce fidei commissa or trusts. A custom had grown up of evading the laws of descent, by leaving an estate by last will to one person, with a confidence reposed in him, that he would deliver the property to another, whom perhaps the strict law would not allow to receive it from the testator. This disposition of an estate was called *fidei commissa*, or in modern language, a trust. Made as a doubtful experiment, it became a very general practice, and the prætor gave an action to the person for whose benefit the arrangement was made, against the one actually receiving the property, to compel him to carry out the wishes of the deceased, and deliver the inheritance.

§ 191. Another very important class of proceedings introduced by the prætors in aid of the equitable interests of parties, were interdicts and restitutions, for the prevention of injuries, or the restoration of persons to rights which they

had lost. These were issued by the magistrates, in a somewhat summary way, without the aid of the judex, and at length became even more common than actions. Modern courts of chancery have adopted the interdicts under the name of injunctions.

§ 192. I have dwelt thus at considerable length upon this portion of Roman legal history, because it serves to illustrate in a striking manner that of England. When we come to view the progress of jurisprudence in the latter country, we shall discover the same causes at work, in an identical manner, the judges yielding to the demands of the times and the wants of suitors, inventing new forms of legal remedy, and thus suffering the law to flow on into new and ever widening channels.

§ 193. We have traced the gradual formation of the English law courts, and the progress of the jury trial through its successive stages, as an essential element of those courts. I now propose to show in what manner these tribunals have contrived the different forms of judicial actions, through which civil remedies are attained and criminal offences are punished. I shall then trace the same process in the courts of chancery, and therein show the rise and growth of the rules of equity as distinguished from and supplemental to those of the technical law.

## II. *Of the Origin, Classes, and Uses of Actions in Courts of Law.*

§ 194. 1. *Civil Actions.*—In the English and American Law, as well as in that of Rome, an action in its general sense is an ordinary formal proceeding in a court of justice between two parties, for the protection or enforcement of a right which the law permits to be protected and enforced. This definition includes all those proceedings brought at the instance of a private individual or of the State to restrain or redress or punish the commission of a wrong, for these assume a right on the part of the plaintiff which is

thus protected and enforced. In general the person who is the moving party in an action is called the plaintiff, and the person proceeded against the defendant.

With the Norman conquest, as I have already stated, the idea was introduced that the king was the fountain of justice to his subjects. This may be said still to be the theory, and for generations it was strictly true in practice. From a very early period under the Norman kings, no person could commence an action in one of the superior courts of law, without the sanction of a king's writ, which was a formal writing in the royal name, and bearing his seal, requiring the defendant to appear and answer to the plaintiff's complaint, and giving jurisdiction to the court to try the particular case. It must not be supposed that these writs were actually issued by the king, but their allowance was under the direct supervision of his highest officer, who had charge of the state seals, the chancellor. These writs were all drawn in accordance with the well-known and recognized rules of the law, stating briefly the nature of the complaint and the circumstances upon which the claim for relief was founded. If the facts alleged by the plaintiff brought his action within some ordinary and recognized principle, for which a writ had been already devised, he could obtain the process from the chancellor as a matter of course, by the payment of the requisite fees. When the case was entirely new, and no writ had been framed applicable thereto, the deficiency might be supplied by the king and royal council. The actual drawing up and preparing these important proceedings was confided to a number of special clerks, connected with the chancellor, who were not merely scribes, but men learned in the law. Such continued to be the practice down to the thirteenth year of the reign of Edward I., when a statute was passed whose effect was greatly to enlarge the number of these original writs, and increase the scope of legal remedies. But a description of this change belongs more intimately to the

subject of forms of action, and is deferred until that is reached. These writs were the very foundation of all subsequent judicial proceedings. No action could be commenced and maintained, unless it was based upon a writ specially adapted to its form and object. This method of instituting a suit continued in England for a long time, but has been superseded by a more simple process.

§ 195. In the United States, the original writ issued from the government has never been used, but actions were formerly begun in most of the older States, by a process granted in theory by the court in which the cause was brought. The tendency towards a greater degree of simplicity in all judicial proceedings, has been shown from time to time in modifications of this practice, until at length in New York, and some other States which have copied its legislation, the principle of informality has been reduced to its lowest term. By their recent procedure, the theory of administering justice in the name of the State, and with its sanction, has been entirely abandoned; a party is informed that an action is commenced against him, by a writing, which bears and requires no official characteristic from court or officer, but simply the signature of the plaintiff or his attorney, both perhaps alike unknown to him, and is summoned to appear and defend this action within a specified number of days, under the penalty, that a judgment will be given against him upon his failure so to do. That this system has anything to recommend it, I think no one will claim. In commencing those solemn judicial proceedings, through which, by the aid of courts and juries, the law is brought to bear upon individuals, and rights are established, and property, character, and liberty are lost or won, the voice of the State in its sovereign capacity should be heard; everything should not be left to the honesty and capacity of suitors and their attorneys. ? ?

§ 196. The use of formal actions was introduced into England with the gradual consolidation of the superior

courts under the early Norman kings. During the Saxon rule, there were, properly speaking, no actions; all proceedings were informal and oral; but the more matured ideas of the conquerors soon found an expression in a systematized procedure, of which the essential features have been retained to this day.

§ 197. At the earliest period of their existence, actions were divided, as in the Roman Law, into real and personal. Real actions were used to try the title or ownership, not simply the right of possession, to lands or real estate. They had a general resemblance to the same division in the Roman procedure, but differed from them in being confined to a single species of property. They were quite unlike the other class of remedies in their detail, and have long since been abandoned. As their place has been supplied by modifications of other actions, it is needless to occupy our time with any examination of their methods.

Personal actions were those which enforced obligations and rights growing out of contracts or wrongful acts, and were therefore separated into actions *ex contractu*, and actions *ex delicto*. As I have already stated, these actions were founded upon the original writ, and none could be used for which such a process had not been provided.

§ 198. In very ancient times there were four forms of personal action which might be commenced in the superior courts of law, two of them, called debt and covenant, being *ex contractu*, and two, trespass and detinue, being *ex delicto*. The action of debt was the appropriate one in which to recover a sum of money whose amount was already reduced to a certainty, so that it required no deliberation or assessment of damages to ascertain it. The action of covenant was confined to the recovery of damages for the breach of a sealed agreement in writing. It differed essentially from debt, in that it required the affirmative action of a jury to decide the amount of these damages. The action of trespass was used for the recovery of damages resulting from

acts of violence done to the person or property of the plaintiff, and was characterized by the technical description in the writ, that the defendant's acts were done with force and arms, vi et armis, and against the peace of our lord the king. Detinue was a proceeding for the recovery of specific goods and chattels wrongly detained from their owner. In addition to these, the action of replevin was a common method of obtaining the possession of certain kinds of chattels, being originally confined to cattle, but it was always commenced in an inferior court.

§ 199. From this sketch of the ancient forms of judicial proceeding, it will be seen that there was absolutely no provision made for the enforcement of a vast majority of the legal rights, which are now, and for a long time have been, the most common and important. All breaches of contracts resting in mere words, and of those in writing not under seal, unless they created an absolute and stipulated debt, were remediless. All obligations arising from the mere acts of parties, which now form so large a part of the rights that courts enforce, and which spring out from the plainest principles of justice and equity, were unrecognized. All rights resulting from deceit, fraud, and other wrongful practices not absolutely forcible, the courts passed by in silence. In this state of legal procedure and judicial remedies, we can read the condition of English civilization at that early period. We see lands as almost the sole species of property possessing a recognized value; contracts few and generally reduced to writing, and formally solemnized by a seal; a people rude and used to violence, with scarcely any trade, commerce, or manufactures.

§ 200. But the courts and the law must keep pace with the culture of the nation, reflect its general ideas, and provide for its wants. The people move first; the necessities arise, and the law responds to them. The demand for an enlargement of the number and scope of legal remedies, growing out from the increasing complications of business

became so pressing that in the thirteenth year of Edward I., a statute was passed with the design to relieve the inconvenience by providing for new forms of writs, and consequently of actions based upon them, without the delay of an application to the king and council. This statute enacted that "Whenever from henceforth it shall fortune in chancery that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks of chancery shall agree in making the writs." Thus was opened the way for new actions and remedies to apply to all the new circumstances which could arise, and the judges were not slow to avail themselves of the privilege, because it afforded an opportunity not only to do prompt and substantial justice between parties, but also to enlarge in an unlimited manner their own jurisdiction.

§ 201. I have already said that the old action of trespass, both in the form of its writs, and in its further proceedings, was applicable only to those wrongs which were attended by actual violence (vi et armis). The first act of the chancery officers in contriving new writs, and of the judges in accepting and enforcing them, was to extend this action to cases where the injury was *consequential* or indirect, instead of being the direct result of force, and hence arose the general class of actions since known as Trespass on the Case. These were at first applied in cases of *malfeasance*, where a person had been guilty of an absolute wrong, had done something which he ought not to have done, and thereby had caused damage to the plaintiff. Between this beginning, and instances of *misfeasance*, or doing in a wrongful manner, what ought to have been done well, the division was shadowy, the step was short and easy, and soon taken. When this point was reached the courts found themselves able to entertain actions not only for acts of violence, but for fraud, deceit, carelessness, neglect, and the like.

§ 202. As yet there was no remedy for the breach of those contracts which could not be enforced by the actions of covenant or debt. To supply this want, the courts, still retaining the idea of the wrong done by the defendant, so as to preserve the theoretical connection with the primitive action of trespass, extended the new form of proceeding to include the case of *nonfeasance*, or that in which a person had failed or refused to perform what he had actually or impliedly promised to do. This step in advance produced the action of *assumpsit*, which grew to be the most common and important judicial method of enforcing legal rights. It includes all those cases in which a contract or an obligation in the nature of a contract is inferred by the law from the acts of parties, as well as those in which the terms of a definite agreement prescribe and determine their liabilities.

§ 203. The course of reasoning which extended the remedy of Trespass on the Case, which I have just described, to simple contracts, was more subtle than natural. The relations of the parties resulting from their original agreements, were overlooked, and the idea of the failure of duty, and therefore of wrong, in neglecting to comply with the obligation, was made prominent, as the foundation of the action. Although in its origin, the action of assumpsit thus partook rather of the character of an *ex delicto* remedy, it has for a long time been regarded entirely as within the class of those *ex contractu*. By its means a very large portion of the modern mercantile and commercial law, has been added to the jurisprudence of England and America. It is eminently an equitable form of remedy, quite analogous to those *bonæ fidei* of the Roman procedure. It is used in a very extensive class of cases which are of every-day occurrence; as when the plaintiff sues for work and labor done by him, at the request of the defendant; or for goods sold and delivered to the defendant; or for money had and received by the defendant for the plaintiff's use; or for money laid out and expended at the

defendant's request. In each of these instances the law implies an assumpsit, or promise on the part of the defendant, to make reparation, and under some one of them, almost all of the ordinary transactions of business can be brought.

§ 204. Two other actions were invented by the judges, subsequent to the statute I have mentioned, which have become important in the development of the law. The one is called, Trover, and is used to test the title or ownership to articles of personal property; the other is Ejectment, which is employed to try the title to lands. The former soon supplanted the old remedy of Detinue, from its greater simplicity and convenience. Its peculiar name is derived from the Norman word, which, in the old forms, characterized it by the use of a fiction. The plaintiff was made to allege that, being the owner of a certain chattel, he casually lost it, and the defendant having found it (Trouver), refused to deliver it back. This charge of losing and finding, the defendant was not permitted to deny, which left the question of ownership the only one to be determined. The relief granted, however, was pecuniary damages, not the possession of the property. The action of Ejectment entirely drove the old and cumbrous Real Actions from the field, and became in England and America the only means of testing a claim to real property. It also was based upon a number of curious fictions invented by the courts to work justice, and at the same time to save them from actually in terms abolishing existing rules and forms.

§ 205. After the judicial procedure became settled, down to a recent period in England, and in many or most of the American States, the following actions, which I have already described, were in constant use in the courts of law, as the instruments by which private rights were enforced and private wrongs punished. *Trespass* to recover damages for a wrongful act of violence to a man's person or property; *Trespass on the Case*, to recover damages for

a wrong unaccompanied by actual violence, or when the injury was consequential, thus including a vast number of particular instances; *Covenant*, to recover damages for the breach of a sealed agreement in writing; *Debt*, to recover a fixed certain sum owed by the defendant, not as damages; *Assumpsit*, to recover damages for a contract not sealed, whether written or verbal, express in its terms or implied by the law; *Trover*, to recover damages for the unlawful detention of personal property; *Replevin*, to recover the possession of specific articles of personal property; and, *Ejectment*, to recover possession of lands, and try the title or ownership thereto. I draw particular attention to the fact, that, in all of these actions but the last two, the satisfaction demanded by the complaining party was a sum of money, and that with the exception of the single action of Debt, this was awarded in the form of damages, to be settled by the jury. This circumstance is important in its bearing upon the origin and rapid increase of business in the Court of Chancery, which was restricted by no such rule, in its administration of justice. Many other special proceedings were also in use, which, however, it is not necessary to specify.

§ 206. The actions which I have mentioned being in full force in England, were adopted by the American States, and still remain in some of them. The progress of legal reform, however, has lately swept away much of these technical contrivances. In England, many changes have been made, which greatly affect the proceedings in an action, but the essential features and classes yet exist. In some American States the whole structure has been overthrown, and the foundations ploughed up, so that not one stone is left upon another. Recent statutes of New York, based upon the constitution of 1846, have abolished all forms of legal action, as well as all the methods of proceeding in the ancient Court of Chancery, and instituted one instrument for the ordinary enforcement of all private

rights, termed a Civil Action. Many other States have imitated the example set them by the great commonwealth of New York. We have thus reënacted the legislation of Rome, which in its latest days, reduced all forms of judicial procedure to one, and have given another illustration of the fact that nations and institutions repeat themselves in endless cycles.

§ 207. These forms, which have been cast out as useless and cumbersome rubbish, although they had perhaps become clogs upon the free activity of the law, and the operations of business, were once the most important aids in promoting both. Every student of law should remember that they were invented to promote justice, to amplify the remedies open to suitors, to extend the power of the courts in doing the right between parties; and that, while having subserved this purpose, they are now laid aside, they are entitled to their meed of respect and praise for the good they have accomplished in times past.

§ 208. The classes and appropriate uses of legal actions having been defined, I shall now state the successive steps which were taken in them to reach a decision; and that first in order is the method of presenting the statements of facts from which the legal rights and liabilities of the parties are supposed to spring, and which are denominated the Pleadings.

§ 209. In very early times, after the Norman conquest, and before the courts were entirely consolidated and the procedure settled, these statements were oral. The defendant appearing before the judge in answer to the writ, the plaintiff publicly recounted his grievances, and if they were sufficient to create a liability, the defendant was forced to admit, deny or excuse them. This primitive proceeding is still retained in our courts of the Justices of the Peace. Soon, however, the judges required the pleadings to be made in writing and more formal and comprehensive. Copying without doubt from the Roman procedure, they

established a system similar to that, in all of its essential features. The plaintiff presented the facts of his claim in a writing, called the Declaration, which took the place of the Roman Intentio. To this the defendant answered by a plea, which might be a short and simple denial of the facts averred by the plaintiff, and was then termed the General Issue. Thus in the action of Trespass, and some others, he answered that he was not guilty of the wrongs charged against him; in that of Assumpsit, that he had not made the promises stated in the declaration; in that of Debt, that he was not indebted. This allegation on the one part, and denial on the other, formed what the English lawyers called the Issue, being the same as the *Litis Contestatio* of the Roman practice. The defendant on the other hand, might, by his plea, admit the facts recited by the plaintiff, and in turn affirmatively set forth other circumstances which would relieve him from his liability. This species of plea is analogous to the Exceptio of the Roman lawyers. The plaintiff in answer to this new statement, could either simply deny it, or if necessary admit it, and reply other facts which showed the obligation to be still subsisting. How far these alternate pleadings should go, depended entirely upon the peculiar circumstances of each case; they always proceeded, however, until a fact was alleged on the one side and denied by the other, on the decision of which the whole cause depended.

§ 210. All this is natural, simple and logical. There is nothing in it arbitrary or technical. It is only the requiring parties to tell their stories in an orderly and methodical manner, with all unnecessary detail stripped off, so that the real point in dispute shall be eliminated and clearly placed before the jury, for their decision.

I have said that this system of pleadings was, without doubt, derived from the Roman formulas. The resemblance is too striking to be accidental. The English judges, for a long time under the Norman Kings, were drawn from

the Ecclesiastics, who throughout Europe were, as a body, versed in the principles and details of the Roman law. In forming the technical procedure for their courts, they naturally borrowed what was ready made to their hands, instead of inventing new methods.

§ 211. Certain general principles of pleading were adopted by the judges expressly to preserve its simplicity and efficacy. But these salutary laws in the process of time became subdivided into a great number of particular rules; extreme nicety was required; the form grew to be of more consequence than the substance of a controversy; rights were lost by the omission or improper use of a phrase or word; the original unity and conciseness were replaced by a vast amount of diffuse verbiage, which only covered up and concealed the essential facts, instead of displaying them in clearer light; in short, the system of pleading, from its verbal refinements, its technicalities, and its deference to forms, became a source of continual and glaring injustice. Modern statutes, while retaining the essential ideas, have restored much of the theoretical directness and natural order in England.

§ 212. In America, the same methods of pleading were adopted, the same perversion took place, followed by the same evil consequences. Here, however, the reform has been more radical; it is still a question whether it will prove as beneficial. With the forms of action, the State of New York has discarded the English system of pleading, and substituted another entirely unique. The plaintiff states the facts constituting his cause of action in a complaint, which must set forth his story in plain and ordinary language. The defendant responds in an answer, which contains whatever constitutes his defence, whether mere denial or legal excuses. No endeavor is made to aid the jury by bringing out the important facts, and reducing the controversy to a single question, but they are left to perform the labor themselves which the old system required to be

done for them. I am strongly of the opinion, that, in our disgust at mere verbal technicalities, we have swung into the opposite extreme, and that the English reform legislation, by pruning off the excrescences, but retaining what is natural and good of the former methods, has been wiser than ours.

§ 213. 2. *Criminal Actions.*—A statement of the proceedings in criminal cases, will complete our survey of the actions and pleadings peculiar to those English and American courts which use the jury trial. These remain in both countries substantially as they have existed for generations. There is one form of criminal action, and that is simple and concise. The offender may be arrested, examined and committed to custody by a magistrate, but this is not indispensable. The first essential step of the action commences with the Grand Jury. This body of substantial citizens of a county assembles as an integral part of a criminal court, is sworn to secrecy and faithfulness, and proceeds to investigate whatever charges may be laid before it, or may be within the knowledge of its members This inquiry is of course *ex parte*, and is satisfied with discovering a case of probable guilt against a person accused. If the testimony presented to them be sufficiently strong to warrant a formal and official charge of crime against the suspected party, that charge is embodied in an Indictment, which is the only pleading on the part of the State, and which sets forth in direct terms the alleged offence, with the time and place of its commission. This instrument, duly authenticated by the grand jury, is delivered to the court, and thus not only initiates the action by giving the court jurisdiction over the person of the criminal, but is also the pleading which contains the necessary facts to acquaint the defendant with the crime charged against him. To this indictment he must answer either by confession or denial. In the great majority of cases his pleading is oral, and consists simply of the words "Not guilty."

§ 214. The indictment itself must conform to some general rules which were adopted to secure certainty and order in its charges, so that the criminal may be fully apprised of the nature of the accusation. These rules may have been carried to an unnecessary degree of refinement, but they have only been so, in favor of life and liberty. The salutary principle, lying as one of the foundation stones of the criminal law of England and America, that the prisoner shall be apprised of the offence, so that he may make due preparation to meet it, has been carefully guarded by the courts, by requiring that the indictment shall state a single crime; that this shall be described with all possible certainty as to time and place; that the person injured or property invaded shall be correctly set forth; and that the guilty intent, which is the essence of the offence, shall be distinctly charged.

§ 215. The innovating hand of reform has not as yet touched the long-established proceedings in criminal actions, nor does it seem possible to contrive a system which shall better carry out the ideas upon which our penal law is founded. The Grand Jury carefully preserved by our National and State Constitutions, appears to be an invincible barrier against official oppression, by making the private citizens themselves the originators of all important accusations; the indictment is a safeguard against unfair concealments and surprises on the trial; while the jury, who must pass upon the question of guilt or innocence, being drawn from the people, will naturally strive at once to preserve the law inviolate, and shield the prisoner from injustice. Whether the ideas, which are wrought out by this judicial machinery, are in themselves the best conceptions of the relations existing between the criminal and the State, is, I think, a question involved in more doubt than English and American writers have generally admitted.

§ 216. A short account of the procedure in some of the European countries, will enable the student to make an

interesting comparison between other national methods and our own.

As a type of the practice in criminal cases of the German States, I will briefly describe that of Bavaria. In their courts there are no juries. Their judicial officers are separated into two classes whose functions are entirely different,—the judges who examine and take the proofs, and the judges proper who decide. The former class combine in part the duties of our examining and committing magistrates, prosecuting or State attorneys, grand juries and police detectives. There is nothing analogous to the investigation by a grand jury, and the finding by them of an indictment. No formal complaint or written accusation is made the basis of the proceeding. When a crime is discovered and brought to the knowledge of the examining judge, he immediately begins to collect the evidence bearing upon it. We will suppose that a homicide is under investigation. The first step is to have a careful detail made of the entire physical appearance of the dead body, and of the place where it is found, and where the crime was apparently committed. In conducting this examination, the utmost caution and accuracy are employed, which the nature of the place, and the circumstances and character of the crime will admit. Nothing is left to the mere memory of the witnesses who may have been casually present at the scene when the discovery was made. So minute is the examination that footprints are often preserved by plaster casts, so as to be useful in identifying a suspected person by his tracks. Should the circumstances point with sufficient strength of suspicion to any individual as the guilty party, he is apprehended and committed to prison. Great caution is observed at the time of the arrest, and during the continuance of the examination, to conceal effectually from the suspected party the nature of the crime charged against him, and he is permitted to have no communication with others. Meanwhile the judge proceeds to take the deposi-

tions of witnesses. But any account of the principles of evidence adopted by the German codes will be postponed to a subsequent section.

§ 217. In France, the jury is used in criminal cases, but grand juries do not form a part of their institutions. The foundation of the judicial proceedings, is an *acte d'accusation*, prepared by the procureur général, a ministerial officer representing the government, and conducting the prosecution on its part. This *acte* differs largely from our indictment. The latter is scrupulously technical and guarded. It states in legal language and in general terms the crime charged, without any detail or evidence. In setting forth a murder, for example, the effective statements are, that at a certain time and place, the defendant with malice aforethought, or premeditated design to effect the death of a particular person, by a certain instrument inflicted a blow upon him from which death resulted, and thus feloniously murdered the deceased. Everything is simple, concise, and to the point, and by an unalterable rule the indictment must be confined to a single offence. The French code directs that the *acte d'accusation* shall state, first, the nature of the crime which forms the basis of the charge, and, secondly, all the circumstances connected therewith which tend to aggravate or diminish the guilt. The result of these directions is, that the *acte* is regarded by the state's officer as a proper field for the display of his eloquence in composition; it abounds in graphic and picturesque descriptions of the persons and scenes involved in the case; it assumes and states as matters of fact the thoughts conceived by the accused and the victim, and the motives which prompted the deed; it details at length the personal history of the defendant, his advantages and prospects, his temptations and fall; it aggravates the feeling of horror at the crime, and condemnation of the perpetrator, by violent denunciations and pointed appeals to the jury; in short, it buries the simple complaint in a mass of incident, assump-

tion, argument, and abuse, which destroys entirely the character of the instrument as a calm, grave, preliminary statement of the grounds for the proceeding of the government against the prisoner at the bar.

III. *Of the Origin and Use of Actions in Courts of Equity.*

§ 218. I shall now proceed to describe the course of an action in Courts of Equity, and therein to state the origin and growth of equitable principles, as a part of the municipal law distinct from and supplemental to those developed by the courts organized with a jury as an essential feature. The system of rules to which the technical name equity is given, was devised to meet needs almost inseparable from the constitution and procedure of the courts of law. It must not be supposed that any antagonism exists between the law and equity; that conflicting sets of legal principles and maxims are embodied in our jurisprudence. The municipal law of England and of the American States is a unit, but different courts take cognizance of different classes of questions and afford different remedies.

§ 219. Immediately after the superior law courts were consolidated, and their jurisdiction defined, and while they were settling their procedure, it was evident that defects existed in the system, which even then worked injustice, and which would continue to do so more and more as business should increase, and the law should become more comprehensive. I have already pointed out some of these faults, and have shown how the judges, acting upon the initiative of the legislature, proceeded to remove them by inventing new forms of action and amplifying the remedies. But still a large and growing number of cases remained unprovided for by any of the regular judicial forms. The limits of this work do not allow me to point out in detail these instances of failure of justice, nor to set forth at length the subjects which became cognizable in the court of chancery; it will be sufficient for me to indicate in a very gen-

eral manner what these necessities were, and how the court met them, so that the student may understand the relative position which equity and the tribunals administering it assumed toward the technical law and its peculiar courts.

§ 220. It may be asked why the superior courts of law did not themselves supply any *lacunæ* in the system, and thus avoid the necessity of a distinct jurisdiction? There was in fact no insurmountable obstacle which absolutely forbade this action on the part of the judges, but two important reasons rendered it difficult, nay, almost impossible. The first was the constitution and judicial methods of the law courts; the other was found in the principles which the judges had tacitly adopted to guide them in the administration of justice and the development of the law.

§ 221. From an early period the judges of the Superior Courts of England were governed by close and severe methods of reasoning, in deducing new rules from established doctrines. The premise once laid down in some former decision, they followed it undeviatingly to the end, irrespective of the justice or injustice which it might work in the particular cases to which it was applied. This logical form of unfolding the law has always characterized these courts, but much more in former than in later years. The development of the rules relating to real property, as they were drawn out from a few fundamental maxims, resembles the process of geometric demonstration in its orderly march. These deductions of pure logic, thus stamped by the judges with the character of positive law, of necessity often produced so much injustice to suitors, that the very end of municipal law was defeated.

§ 222. Added to this tendency of the judges, and greatly enhancing the difficulty of any relief to be afforded by them, was the jury trial, as a constituent part of the courts. It was perceived from the first, that, to enable a jury to fulfil their functions, the questions presented to them for decision must be simple, single, divested of all modifying

influences. It was really for this purpose—to aid the jurymen—that the legal remedies administered by the courts were cast in the mould of separate and distinct forms of action, so that the vital point in each particular action should always be the same; and that the pleadings were so contrived, closing by a single affirmation and denial, that the matter in dispute should be nakedly presented for the consideration of the triers. However well the jury might answer for all the wants of society in its simplest state, a little progress in culture, with the attendant increase of business, and complexity in the dispositions of property, soon created classes of judicial investigations entirely beyond its scope and design.

§ 223. These two causes were sufficient to prevent the law courts from following those maxims, and granting those remedies, which have been appropriated by the court of chancery, and which are known as equity. The Roman prætor, as we have seen, was hampered by no such restrictions; he possessed an extraordinary as well as ordinary jurisdiction, and could act either with or without the help of lay judges of the fact. No new equity magistrate was then necessary, and the prætor could dispense justice in either form, at one time as a law judge, at another as a chancellor.

§ 224. A few instances will suffice to illustrate both the deficiencies and the remedies.

The courts of law in early times gave great authority to the use of a seal upon an instrument in writing. As a natural consequence of this deference to a form, they decided that the liability arising from a bond or other sealed instrument could only be discharged by a writing also under seal. It is true that this rule had no foundation in abstract justice, but it was a logical result of the value attributed to this method of solemnizing a written engagement. As a consequence, if the debtor had actually paid the sum secured by a bond, and had failed to exact from his creditor a sealed

discharge, the agreement was still left binding upon him, and he could not resist an action brought upon it, to recover again the money which he had already paid. The fact of payment might be undisputed, but the law as administered by the courts would give no relief; the logic of the system must remain undisturbed, no matter how unjust it might be toward the suitor. Here was a case for equity to interfere through the chancellor, not to repeal the doctrine of the law courts, but to promote substantial justice by preventing the creditor from prosecuting his suit on the bond.

§ 225. Again, in an action brought upon a written instrument entirely regular and formal, properly signed and sealed, the defence might be that the writing was executed by mistake, and did not contain the real agreement of the parties. The common law courts with a jury had no means of giving efficacy to such a defence. Under their forms of procedure, they could only decide whether the party did in fact execute the instrument, and determine the amount of the debt or damages. No judgment could be rendered that a new agreement should be substituted conforming to the actual meaning and intention of the parties. This obvious defect gave rise to another department of equity, whereby the chancellor is empowered to correct mistakes, and reform, and even cancel deeds, mortgages, bonds, and other writings.

§ 226. Again, the remedies allowed by the courts of law, were entirely compensatory, and not preventive. Their judgments only awarded pecuniary damages for injuries already done, or restored possession of property unlawfully withheld; they had no power to interfere and prevent a threatened invasion of rights. A legal system, thus deficient, would permit many wrongs, for which no damages could compensate, and would fail to extend that protection to the citizen which he has a right to demand. The Court of Equity was invoked to supply the defect, and

in response, it borrowed from the Roman procedure the important and most beneficial process of Injunctions. These are solemn orders, issued by the chancellor at the request of a suitor, forbidding a defendant, under heavy penalties, to do some threatened act, which would be contrary to the rules of equity, and would work irreparable mischief to the plaintiff. Thus, an injunction would be allowed to stop the prosecution of an inequitable suit in another court, or to restrain a fraudulent debtor from disposing his property. These examples will sufficiently illustrate the use of these remedies.

§ 227. The jury trial was also an inefficient means in the decision of controversies involving extended accounts, such as arise between partners, and persons jointly engaged in business. Hence this important branch of judicial duties was allotted to the Court of Equity.

§ 228. The ancient methods of owning and transferring landed property were simple, plain, and public. With increasing wealth and refinement, the original simplicity was abandoned, and complicated dispositions of land were introduced, before unknown to the law. The most important of these was borrowed from the Roman jurisprudence, by them called *fidei commissa*, by the English known as Uses. Before this innovation, every transfer of property was public; the new owner, purchaser, or recipient was known; the sale, or gift, or devise was to him directly; he enjoyed the benefits and was subject to all the burdens of the new acquisition. By the new contrivance the original proprietor could dispose his land either by a deed or by will, with a secret understanding or confidence reposed in the receiver, that he was not to hold the property himself, as his own, but was to transfer it to, or keep it for the benefit of, a third person. The intention of the parties to such an arrangement was, that the apparent purchaser was to have no real interest in the estate, but that he was to be a mere channel through which it or its benefits should pass to the virtual

There was no devise at this time. A devise was an incident of the doctrine of uses and of a legal estate. 2 Bl. 329.

owner. Whether this intention should be effected, depended, of course, upon the honesty and good faith of the individual to whom the public sale or gift had been made. Should he neglect or refuse to perform the duty imposed upon him, the person for whose use and benefit the transfer had been made could have no remedy. The courts of law did not recognize his claim. The strict legal rules regarded the party to whom the public conveyance had been made, as the only one possessing any interest, and treated the secret condition under which he received the property as an entire nullity. Yet these rules of the law were plainly unjust, and means were devised to compel an observance of the intention of the parties. The courts of equity took control of these cases, and at the suit of the beneficial owner, compelled the apparent owner to perform the trust reposed in him. The rights to lands so created were termed uses, and their enforcement formed a very large share of the duties of the chancellor.

§ 229. The illustrations which I have thus given will serve to explain how a system of rules grew up, partly remedial, and partly supplemental to those of the strict law, and which at the same time formed an integral part of the jurisprudence of the country. In the process of time these principles became a consolidated system, not governed by any mere caprice or private opinion of the chancellor as to what was right in a particular case, but following precedents and developing in a well-arranged order and succession from general and fundamental maxims.

§ 230. I shall now state how the large and most important class of cases which I have briefly described, devolved upon the chancellor, as the proper judicial officer for their decision. I have already shown that the judges of the law courts, both from their habit, the structure of their tribunals, and the form of their proceedings, were indisposed and unable to take the initiative, and create the additional departments of the municipal law which are called equity.

Before the organization of the Court of Chancery as a distinct tribunal, a suitor who could not obtain justice from the courts of law, had no other alternative than that of applying to the king himself, as the final source of justice to his subjects. Such a course was in strict accordance with the theory upon which all judicial powers were founded. The ordinary courts were but the ministers of the crown, and if they failed to do the right, parties must resort to the fountain. These appeals to the king were entertained by him, or by his council, and for a while an imperfect kind of justice was administered in the exceptional cases brought before them, not according to any rule or precedent, but having no guide except the ideas of right entertained by the monarch and his advisers. But as the number of these applications increased beyond the ability of the king to devote to them his personal attention, the practice arose of referring them to the chancellor, who, in his high official character of confidential adviser to the crown, and chief officer of the state, seemed to be the most appropriate personage to relieve the king of these semi-judicial duties. In the twenty-second year of the reign of Edward III., a general order was made referring all such matters for examination and decision to the chancellor, and from that epoch it is generally considered that the Court of Chancery dates its commencement as a special tribunal possessing an exalted jurisdiction distinct from that of the Courts of Law.

§ 231. The forms in which the disputes of parties are brought before the chancellor are widely different from those existing in the law courts. They took their shape from the essential character of equitable as distinguished from legal doctrines. A suitor in the latter courts must base his claims upon some precise rule, either already established by statute or decision, or necessarily resulting therefrom; the only relief which he could obtain was in the shape of pecuniary damages, or possession of lands or chattels. On the other hand, the question whether a party was

entitled to any relief in the Court of Chancery, and if so, what should be its nature, depended upon the varying circumstances of each controversy, upon a multitude of subordinate facts surrounding the principal one. In addition to this vital distinction, the class of subjects entertained by the chancellor often required that he should probe the conscience of the defendant, and wring from him an avowal of acts and intentions hidden in his own breast, all of which was in direct antagonism to the methods of the law courts, which allowed a lock to be placed upon the mouths of the litigant parties.

§ 232. To respond to these necessary features of the chancellor's jurisdiction his judicial forms were admirably contrived. There was but one kind of action, flexible in its nature, easily accommodating itself to the requirements of each case. It needed no original writ or process for its commencement. The plaintiff took the initiative by addressing to the chancellor a pleading technically known as the Bill of Complaint, in which all persons were made defendants who would be legally affected by the result of the cause, however different their interests might be. It stated all the facts and circumstances out of which the claim for relief arose, as well as the grounds upon which the defendant was supposed to rely in resisting the plaintiff's demands. The most striking feature of the Bill, however, were the Interrogatories, which might be used or not at the plaintiff's option. In them were incorporated a series of questions touching the points in dispute, intended to elicit from the adverse party such statements and admissions as would assist in the proof of the case. The pleading ended with a prayer for the particular relief to which the party supposed himself entitled, and for the general relief that the chancellor would act according to equity and good conscience in the matter. The plaintiff had the privilege of swearing to the truth of his complaint, and of thus compelling the defendant to disclose his case under the solemn

restrictions of an oath. Upon the presentation of his pleading, the court issued a process called a Subpœna, which notified the adverse parties to appear and defend the action.

§ 233. The ordinary pleading of the defendant was called the Answer. In it were set forth at large, all the facts upon which he relied, whether they had the effect entirely to defeat the plaintiff's recovery, or only served to modify it. If required by the complaint, the defendant was compelled to answer under oath all the interrogatories proposed to him, thus making himself a witness for both parties. Various rules were adopted, which I need not here describe, to compel the defendant to make a full and complete answer, without evasion or concealment, for very much of the efficacy of the Court of Chancery depended upon its power to force an unwilling party to divulge matters within his own knowledge which could never be reached by a Court of Law. It not unfrequently happened that the plaintiff was willing to submit the cause to the judge for decision, without examining witnesses, being satisfied with the revelations made by the defendant in his answer.

### IV. *Of the method of ascertaining the facts in a judicial Trial by Evidence.*

§ 234. 1. *In Civil Actions.*—Having described the actions in courts of law, and of equity, from their commencement up to the time of trial, I shall now explain the principal features of the trial itself, which enable the jury and judge to decide upon the disputed questions of fact, and to determine the rules of law. In a natural order, the first of these is the Evidence, by which the jury in law courts, and the chancellor in equity, are informed of the truth respecting the controversy before them, and are furnished with the material upon which to base their authoritative conclusions.

§ 235. The rule has long prevailed in courts of law, both in civil and criminal cases, that witnesses of a

party must be produced, sworn, and examined in open court, before the judge and jury, and submitted to a cross-examination from the adverse party. This requirement is evidently based upon good sense and justice. The amount of credit to be given to a statement, depends so much upon the appearance and manner of the witness in giving his testimony, that the English and American courts possess a strong safeguard against error and perjury, in the practice of conducting an oral examination in the presence of the triers themselves. It is this feature among others, which has influenced the English and American people to be so strongly wedded to their judicial institutions, in preference to those of the continental nations of Europe. Still this rule is subject to some exceptions. When the witness is in another country, so that his attendance cannot be compelled, or when he is infirm or sick, his testimony in civil cases may be taken, reduced to writing, and read to the jury. In criminal cases, all witnesses against the prisoner must be actually produced, and confronted with him on the trial, no exception whatever being allowed. In Equity proceedings the practice is generally different. Witnesses are examined and cross-examined prior to the trial, before commissioners, and their depositions reduced to writing are read to the court. In some of the American States the Legislatures have interfered, and made an oral examination in open court at the trial, necessary in equity as well as in legal actions.

§ 236. After the witnesses were completely separated from the jury, and required to appear in public before the court, as I have stated in a former section, the judges established strict rules regarding the classes of persons who might be admitted to give evidence in judicial actions. The parties to a suit (with the exception noticed, of the defendant in an equity action) were absolutely excluded, and this doctrine was extended to all those who would be pecuniarily affected by the termination of the controversy. The ground

of this restriction was the actual or supposed interest of these individuals. The judges seemed to have had so low an estimate of human nature, as to declare it to be a presumption so strong that nothing could overthrow it, that all persons who had a direct pecuniary interest in the result of a legal trial, would commit perjury, rather than testify to their own harm, and they therefore excluded them entirely from the witness box. The American courts, borrowing from the English, established the same principle in our procedure.

§ 237. Another rule invented by the English judges and adopted by the American, based upon the theory which regarded the individuals as legally identical, prevented a husband and wife from giving evidence for or against each other, except in a few necessary cases. There seem to be some plausible grounds for this regulation, founded upon the policy which struggled to preserve the institution of marriage inviolate, and to remove all possible occasions for infringing upon its sacredness.

§ 238. Whatever may have been the reasons for the adoption of these maxims, they had become so firmly established at the very basis of the law of evidence, that the legislature alone could abolish them. This has lately been done in England and in some of the American States. The initiative was made by repealing the restriction upon persons interested in the event of an action, and allowing the fact to affect their credibility with the jury only, and not their capacity to testify. The next step was taken by statutes which permit the parties in an action to give evidence for themselves or their adversaries. In England the rule which condemned the husband or wife of a party to silence has been abrogated, except in actions for a divorce on the ground of adultery. Several American States have followed the whole or the greater part of this modern legislation.

§ 239. The considerations which led to this great inno-

vation upon the old ideas are simple and convincing. It was seen to be absurd to shut out from the witness stand all those persons who had a pecuniary interest, however small, in an action, while those who were connected to the parties by the closest ties of relationship or common feelings and prejudices, were freely allowed to testify. Philosophic legislators and jurists had also become convinced that these ancient restraints were founded upon false views of policy, and that justice would be more surely attained by opening to the jury and to the judges all avenues to the truth. Why should the very persons, who, in the vast majority of cases, are the most familiar with the disputed facts, be kept silent, and the triers required to grope after the result, aided only by isolated facts helped out by conjecture and inference? By this modern legislation the door has been thrown wide open, and the simple and effectual rule is established that all persons who have any information to give, may be called as witnesses to enlighten the jurors and the judges. The only restraints are, that the proposed witness should be of sufficient age to comprehend the nature and obligation of an oath; that he should be of sound mind, and that he should not have been rendered infamous by a conviction for a felonious crime. Doubtless the new rule will extend over other States, and become universal wherever our form of judicial procedure prevails.

§ 240. Having thus explained how testimony is to be delivered in courts of law and equity, and what persons may be witnesses in an action, I shall now explain some of the general principles which relate to the substance of the evidence itself, in civil and in criminal cases. These principles are few and simple, founded upon obvious reasons of policy, and considerations of natural justice, adopted to protect parties, to elicit the truth, and to call out such proofs as shall best carry conviction to the minds of those who are to decide. Although the general maxims are few, yet as they are so eminently practical, and are applied in

such a variety of circumstances, they have necessarily been subdivided into a vast number of subordinate rules. Into this detail I cannot of course enter; but the principles themselves, as guides in a judicial investigation, form one of the most interesting and instructive portions of our municipal law. I shall first state those maxims which prevail in the trial of civil actions, and which are common also to them and criminal causes, and secondly, those which peculiarly distinguish the latter, and shall add a comparison between our own system and those of some European countries.

§ 241. It is the duty of the judge who presides at a trial, to determine what matters shall be presented to the jury, or received by the court as evidence. The rules which regulate the admission of these facts are not arbitrary or capricious, but are rather generalizations from a philosophical review of the methods which best produce conviction in the human mind, influenced somewhat by motives of mere expediency. Such evidence as is permitted to be detailed to a judge or jury is said to be competent; its effect upon the minds of the triers depends upon its credibility. Much testimony is admitted as competent, which is not credible, and many facts are rejected as incompetent, which might have produced belief.

§ 242. In regard to its external character, all evidence may be divided into oral and written; in respect to its essential nature, it is direct or presumptive.

§ 243. It is possible, though not necessary, for persons to reduce all their agreements, contracts, and business transactions to writing, and thus to preserve the most ready and efficient evidence of their acts and intentions. The law, however, requires a large portion of the engagements which are entered into, and the transfers of property which are effected, in the ordinary concerns of life, to be formally committed to writing, and permits no oral testimony to establish the facts, on judicial trials. This important rule,

which has so widely extended an influence, and which affects every description of business, was established in England by the statute of frauds, passed in the reign of Charles II., and which has been substantially enacted in most or all of the American States. The important provisions of this statute in England and America, are that, all conveyances of land, or of an interest in land for more than three years, all contracts by an executor or administrator to answer for the debts of the deceased out of his own property, all promises of one person to answer for the debt, default, or miscarriage of another, all agreements made in consideration of marriage, and those not to be performed within a year from the time of making them, and all contracts for the sale of lands, must be in writing and signed by the party to be charged, or his agent. All contracts for the sale of goods and chattels for the price of £10 or upwards (in the American States this amount varies from $30 to $50) must be in writing, unless at the time of the sale the buyer receive a part of the goods, or pay a portion of the price. By statutes in England and the United States, it is made necessary that last wills and testaments should be written. Many contracts, such as promissory notes, bonds, and other sealed instruments, are, from their very nature, in writing. The statute of frauds does not interfere with the essential character of agreements and transfers of property, but simply introduces an expedient rule of evidence, determining how such transactions shall be proved. It was enacted upon grounds of public policy, to promote certainty in business affairs, and to remove, as far as possible, all opportunities for fraud and mistake.

§ 244. After parties have, either voluntarily or by the requirement of the law, reduced their agreements or transactions to writing, they are not permitted, in a judicial trial, by any oral testimony respecting their conversations or mutual intentions before or at the time of completing the instrument, to add to, or detract from, or in any way vary

the meaning of their written stipulations. It is assumed that, by formally committing their engagements to writing, they have thus definitely abandoned all other intentions, and settled upon the one contained in the instrument. Were they now permitted to modify this solemn undertaking by oral evidence, the door would be open to admit all the evils which the statute of frauds was passed to correct. While verbal testimony is not suffered to substitute another contract, or other terms for those expressed by the writing, it is lawful, when necessary, to produce such evidence to assist in its interpretation, so that a court or jury may be possessed of its true meaning.

§ 245. The division of evidence, in respect to its essential nature, is into direct and presumptive. Direct evidence is that which immediately applies to the disputed fact, showing it to be within the personal knowledge of the witness, or to be contained in some writing obligatory upon the party. When the proofs establish collateral facts, with which the principal subject is supposed to be connected, and from which it is to be inferred or presumed by the triers as a consequence more or less natural and necessary, the evidence is presumptive. In both these cases the witnesses are assumed to testify the truth, and the whole structure of judicial proof, and the conviction resulting from it, is based upon this confidence reposed in their integrity.

§ 246. In a great majority of cases, the evidence to substantiate the controverted questions of fact is more or less presumptive in its nature. As individuals in their private concerns continually act under the effect of an overpowering probability, so courts are constrained to yield to the same species of moral proof, striving, however, to eliminate as much as possible all elements of doubt and uncertainty.

§ 247. The presumptions which are constantly used to affect the minds of the triers, are, from the convincing effect attributed to them, divided into presumptions of law, and presumptions of fact. Presumptions of law are those which

arise, necessarily, by an inference of law, and not argumentatively, from a certain state of facts. Presumptions of fact are those inferences which may, or may not be drawn by a jury or judge from circumstances which have been proven to them. The convincing effect of these classes varies with the nature of the subjects which are the premises whence the conclusions follow. Presumptions of fact may be so weak as to carry little weight with them, or they may be so overpowering that no candid mind can resist their force. If it should be proved, in a trial for murder, that the prisoner was hostile to the deceased, and was seen near the place of the crime shortly after its commission, the inference that he was the guilty party would be a presumption of fact, weak indeed; but if to these circumstances it were added, that the deceased was shot by a pistol, that such a weapon, lately discharged, was found upon the prisoner, into which the bullet taken from the dead body exactly fitted, that the wadding which surrounded this ball was torn from a newspaper, and accurately corresponded to the rest of the paper in his possession, the inference of guilt would still be a presumption of fact, but now irresistible in its power to produce conviction. In these cases, the law does not deduce the conclusion as a necessary result of the facts, it is only argumentatively drawn by the triers by the ordinary processes of reasoning. To this class belong the circumstantial evidence, so much resorted to in criminal trials, and a large portion of the proofs in ordinary civil cases.

§ 248. Presumptions of law, on the contrary, are conclusions at which the law arrives, not by argument in each case, but as the results of a wide extended experience. They are disputable or conclusive. Disputable presumptions of law, are those which may be rebutted by counter evidence. The following instances will serve as illustrations of this class. A person accused of crime is presumed to be innocent, and until evidence is offered, this presumption is absolute, yet it may be entirely removed in the course of a trial.

The existence of malice is presumed from the fact of killing a human being, yet this legal inference may be rebutted, and the homicide shown to have been accidental or necessary. The possessor of personal property is presumed to be the owner, but evidence may readily transfer the ownership to its rightful place. The class is very extensive, and the legal rule which raises such inferences, is founded upon the plainest principles of justice, and is in accordance with the general experience of mankind.

§ 249. Conclusive presumptions are those which the law derives absolutely from a given state of facts and will not permit to be repelled by any amount of countervailing evidence. "They are adopted from motives of public policy, for the sake of greater certainty and the promotion of peace and quiet in the community, and, therefore, it is, that all corroborating evidence is dispensed with, and all opposing evidence is forbidden." As illustrations of this class, I give the following examples: Every person is conclusively presumed to have contemplated the natural and probable consequences of his own acts. A certain lapse of time after their creation, is made by statute an absolute presumption of the payment of debts. A continual adverse possession of lands, for a considerable period (usually twenty years) is declared by statute to afford a conclusive presumption that the possessor holds by means of a valid title. These instances might be multiplied, but enough has been given to define and explain the meaning and uses of these classes of presumptions which are inferred from established facts.

§ 250. I shall now give an abstract of the most important general rules which regulate the introduction of evidence in the course of a judicial trial. (1.) The evidence must be confined to the matters in dispute between the parties, as they are set forth by the pleadings. It is not necessary that each fact which it is proposed to establish, should directly prove the question in issue—the very nature of circumstantial evidence forbids this strictness; but each fact,

taken in connection with the others, should have a tendency to establish, at least by natural inference, the matters in controversy. There are some apparent exceptions to this general rule; those which occur in criminal trials are noticed hereafter. (2.) It is sufficient if the substance of the issue between the parties be proved. (3.) The burden of proof rests upon a party who asserts, and not on him who denies a fact. In this requirement the law follows the familiar processes of all logical reasoning. (4.) The best evidence which the nature of the case admits must be produced. This rule is one of convenience, adopted to prevent fraud and mistake. It relates not to the amount or cogency, but to the character and quality of the evidence. Thus, if it appears that a party relies upon a deed or other writing, which it is necessary to prove, the law requires him to produce the original, and not to describe it to the jury by a copy, or by the oral testimony of a witness who has read it and is acquainted with its contents. To this rule there is, however, an important and necessary exception, introduced to prevent a failure of justice. When a writing has been destroyed or lost, or is in the possession of the opposite party, who refuses to produce it, the person relying upon it, may prove the contents if possible, by oral testimony, as this species of proof is then really the best. (5.) As a corollary to the principle requiring the best evidence to be offered, the rule has been adopted that a witness must testify only to facts within his own knowledge, and cannot relate such as he has heard from others. The reasons for this careful rejection of hearsay evidence, are not that it is utterly unworthy of credit, but because it is so liable to an admixture of error, the general experience of mankind pronounces it so untrustworthy, that the ends of justice are better promoted by its absolute exclusion from the courts. The jury and judges rely upon the integrity of the witness himself while examined and cross-examined under the sanction of a solemn oath, but if he simply recounts declarations made by

another, this latter becomes the one in whom the triers must really place their confidence, and that without any oath to bind him to the truth, or any examination to test his means of knowledge, his accuracy, or his integrity. This rule strongly characterizes the American and English procedure, and contributes much to the correctness and certainty of the results of our judicial trials. General as it is, the rule, however, is subject to some modifications and even exceptions. It often happens that the verbal declarations of third persons form a part of the very subject in controversy, when they may be proved as any other fact in the case. Certain matters of pure hearsay, such as family traditions respecting pedigree, entries of births and deaths in family records, inscriptions on tombstones and monuments, the general reputation of an individual in the community, are admitted from necessity. In trials for homicide, the dying declarations of the deceased are permitted to be given to the jury, for the reason that a person in such condition speaks under even a more awful sanction than that of an oath, and his statements are, therefore, entitled to all the weight of those of a sworn witness. The courts have not followed this reasoning to its legitimate results, and they restrict the exception to the single case which I have mentioned. There are other exceptions and modifications, but I should be led into too much detail were I to give them. (6.) Closely connected with the general principle rejecting evidence purely hearsay, although not exactly an exception to it, is the rule which receives the declarations, admissions, or confessions of parties to the action and persons directly connected with them in the subject matter of the suit, when offered against them. This species of testimony is not strictly hearsay, it is rather the substitution of a short method of establishing a fact, instead of that which is more regular and natural, and is based upon the presumption that all persons mean what they say, and intend to be bound by their declarations. Admissions may be oral or

written, or they may consist merely in the direct acts, or even silence of a party. A person was not permitted to prove his declarations in his own favor, but the full admission of parties to testify in their own behalf will virtually abolish this rule. The confessions of criminals are received under the restriction that they must have been strictly voluntary, elicited by no hope of reward, or threat of harm offered to them.

§ 251. 2. *Criminal Actions.*—A general knowledge of the method of procedure in criminal trials, and especially of the kind of evidence which the state may use to establish the guilt of an accused person, is of the highest importance to every good and intelligent citizen. In these rules are bound up much of that fundamental law which throws a safeguard around the personal rights of every member of the community, and protects him in the enjoyment of his individual freedom. If we look at them simply as a means to elicit the truth most unerringly, to pursue the steps of the criminal most closely, and to defend society most effectually from evil, they will appear plainly deficient. In so many respects do they favor the prisoner, stop the prosecution in its pursuit, deny the use of proofs which are constantly employed and relied upon in the daily business of life, that to one unaccustomed to them, they seem poorly devised to promote justice and punish guilt. Continental jurists of Europe, who have grown up under another system, generally look with wonder upon the English and American methods of criminal procedure, and rules of criminal evidence. But in our estimate we should view them, not solely as the judicial instruments by which the state ascertains and punishes its offenders, but rather as compromises between the rights of society on the one hand, to be protected from assault, and of the individual on the other, to be left to the unmolested enjoyment of his natural liberty. They attempt to shield the state, and, at the same time, to abridge in the smallest possible degree the personal free-

dom of the accused. The theory of our system is that a danger to society is to be feared, greater even than results from the unlawful acts of single criminals, and this is, that the forms of the penal law may be used to overpower and oppress the citizen. Hence come these constitutional restrictions which hedge round the steps of prosecuting officers and judges.

§ 252. One principle which lies at the foundation of criminal evidence, and sums up in itself all the other safeguards of individual liberty, is embodied in the maxim that every person is presumed to be innocent, until he is proven guilty, and its corollary that a conviction can only proceed upon such a state of evidence as does not leave a reasonable doubt in the minds of the jurors. This doctrine, which is not peculiar to our jurisprudence, but is common to all scientific codes, is founded upon the plainest requirements of justice. Yet this time-honored maxim should not be misunderstood. Although the accused is in theory presumed to be innocent, yet he is not, nor can he be treated as such. He is placed in confinement, or held to bail, and required to prepare for his defence. The true meaning of the rule is that the burden of proof is thrown on the prosecution; that when the prisoner is arraigned, his case, prior to any evidence, is clear in his favor, and that the state cannot demand a conviction until such proof is offered as shall satisfy the minds of the triers, beyond a reasonable doubt, of his guilt. This principle, as already said, is not peculiar to our law. It prevails, and must prevail, in theory at least, wherever jurisprudence is studied and administered as a branch of ethics. The maxim, in short, means that the accused shall not be convicted upon a mere presumption, but only upon such reasonable certainty as can be obtained from fallible evidence. Under the operation of this salutary rule, upon the arraignment and trial of a suspected criminal, the state, through its prosecuting officers must begin the attack, and proceed until the case

has been established against him, before he can be required to assume the defensive.

§ 253. The next inquiry is, what classes of facts may the state prove, and what may it not, in thus attempting to bring the guilt home to the prisoner.

In every criminal trial, the general charge to be maintained by the government necessarily resolves itself into three separate facts, which logically follow each other in a fixed order, namely, that the alleged acts were committed; that they were done through the agency of the accused, and that they were done with a criminal design. These are distinct propositions, all involved in the idea of guilt, and sometimes requiring entirely different species of proofs. The first is called, in the technical language of professional books, the *corpus delicti*, the body of the offence. It is, of course, the very basis of the charge, upon which the whole fabric rests. In a case of murder, the *corpus delicti* is the actual and violent death of a human being; in robbery it is the actual and forcible abstraction of an article of personal property. The prosecution must first, and by sufficient proof, establish the *corpus delicti*, separately and independently of the remaining elements of the crime, before it proceeds to their investigation. This rule is also plainly founded upon justice. Until the state has shown the commission of a crime by somebody, it cannot jeopard a particular individual by attempting to establish a connection on his part with it. In the judicial investigation of crimes of a high grade, the rule for the proof of the *corpus delicti* is drawn with great strictness. In murder trials, the fact of the violent death of the deceased must be determined by absolute and direct evidence, and not made out by inference or presumption.

§ 254. In establishing the physical connection of the accused with the crime, the utmost latitude is allowed to the prosecution. It may bring forward the direct testimony of eyewitnesses to the guilty deed, or it may base its entire

case upon circumstantial or presumptive evidence. The doctrine that the prosecution and defence may rest entirely upon circumstantial proofs is common to our system and those of European nations, with the exception that by some of the latter, the punishment of death cannot be inflicted, unless to the evidence of circumstances is added the corroboration of the prisoner's confession.

§ 255. A resort to presumptive proof is a necessity in judicial trials. It is relied on, not as some judges have foolishly said, because it is more cogent than the direct testimony of eyewitnesses, but because in the great majority of instances it is the only species of evidence left for the prosecution to adopt. Crimes are rarely committed openly, and so true is this to ordinary human nature, that, when an offence is perpetrated in public view, this fact is always relied upon as tending to show a morbid state of mind in the accused. As we ascend in the grade of criminality from mere assaults and petty thefts, up to murder, we shall find the criminal more completely withdrawing himself from the gaze of any other eye, and more carefully obliterating all marks of his presence and agency in the deed. But it is almost impossible to commit a crime without leaving behind some traces, some inculpating *indicia*, which, combined and grouped together, draw like a network around the miserable offender.

§ 256. Yet this evidence of circumstances has power of conviction only as it so completely involves the accused that no other reasonable hypothesis than that of his guilt is adequate to explain the general and combined appearance. To this end, the circumstances must all be consistent with each other, and with the theory of guilt. What circumstances can be proven, will of course depend upon the peculiar features of each case.

§ 257. In offering the evidence which tends to show the agency of the defendant in the perpetration of the crime, the prosecution is restrained by a rule of the highest im-

portance to the rights of the accused, and which draws a broad line of distinction between the procedure of our courts and those of the continental nations of Europe. This rule demands, that all the evidence, whether direct or circumstantial, shall be confined to the very transaction which is the subject of judicial enquiry. By an inflexible doctrine of our law, the accused stands before the jury, not only presumptively innocent of the crime under investigation, but as guiltless of all evil, as a good and honest citizen of the state; and his past life, acts, and habits cannot be enquired into, with a design to produce evidence of his previous character and moral traits, bearing upon the issue to be tried. The argument from probability is entirely excluded from our judicial enquiries. The law does not allow proof of a former crime, so that the jury may argue the probability of his having committed the present one.

§ 258. In this particular the English law differs from most or all of the criminal codes of Europe. According to their practice, an enquiry is carefully made into the history of the accused from childhood. An investigation is carried into all his habits and pursuits, his associates and friends, his disposition and character, and any evidence is received which will tend to throw light upon his mental and moral peculiarities, which will show or tend to show by what motives he is, or is likely to be swayed. These two systems thus stand in bold contrast. English and American writers are almost unanimous in lauding their own as founded in reason, and as calculated to protect the accused against undue and vexatious pressure from the government. The reasons for the rule are, that the accused is informed by the indictment of the only crime for which he is to be put on trial, and is admonished to be prepared to meet that single and specific charge; that by presenting on the trial, evidence of distinct and prejudicial facts, running back through his past life, he would be surprised at every step, and unprepared with those explanations, which, if opportunity

were given him, he might offer to the jury, and that thus he would be placed completely at the mercy of the prosecution; that if the jury were told of his former bad habits and criminal acts, they would be rather prejudiced against him. than aided in the investigation of the offence which they were trying; in short, that a jury would misunderstand and misapply such species of evidence, and convict from their impression of his general bad character, when there was really no complicity shown on the part of the prisoner with the particular crime charged in the indictment. These reasons are surely convincing, and as long as we retain our present judicial machinery with indictments and juries, there can be no relaxation of the rule under consideration.

§ 259. The guilty intent or design of the prisoner, which is the very essence of the crime, must be established with as much certainty as the other two elements that unite to form the offence. It is, under the operation of our rules of evidence, generally to be presumed only from the character of the act which forms the body of the crime; but in certain instances this restricted range of examination would tend so much to defeat the ends of justice, that courts have gradually permitted evidence of antecedent acts, which, by a rigid adherence to the rule last stated, should have been rejected.

§ 260. Intimately bound up with the question of the intention of the party, is that of the motive which prompted him to the deed. If the state be able to show a natural and reasonable motive, they have done much to explain the character of the act, and the design of the perpetrator. In the assignment of the motive, a wide latitude is permitted, even when the facts which disclose it, go to show another and distinct felony. Thus on a trial for murder, the prisoner might be proved guilty of another homicide, when the motive would be shown to be the concealment of the former crime. In a trial for passing counterfeit bank notes or coin, the criminal intent could hardly be inferred from a

single act, which might have been innocently done through mistake, but would clearly appear by proof that the accused had in possession or had disposed of other spurious money. Thus necessity often requires the courts to depart from general rules, and much of the legal controversies which occupy the attention of the judges, involves the determination of the question when, and to how great an extent, such deviation is expedient and proper.

§ 261. Our penal code gives the accused the benefit of his own silence, and also deprives him of the aid of his own testimony. He not only must not be forced to disclose anything to his own harm, but even admissions voluntarily made by him, if they were in response to any inducements of profit or hurt, are carefully kept from the jury. Nothing but a confession freely given, uninfluenced by any species of moral coercion, is admissible. In this respect our practice differs essentially from that of most European courts, which, as will be seen in the sequel, employ every means to extort the truth from the prisoner.

§ 262. I am strongly of the opinion that the privilege which has lately been accorded to the parties in civil suits, to testify in their own behalf, should be extended to criminals, and that the prosecution should also be armed with the power to examine the prisoner touching the charge for which he is on trial. There seems to be no good reason for opening the door in the one case and shutting it in the other.

§ 263. I shall close this subject of criminal evidence by a sketch of the procedure in some European courts, taking the Bavarian as the type of the distinctive features of the German tribunals. I have already explained the division of their judges into two classes, those who collect the evidence and those who decide. Upon the apprehension of a suspected criminal, the examining judge immediately proceeds to make the necessary examinations of witnesses and parties.

§ 264. The German codes are extremely particular in the character of their proofs, and have established a number of definite rules, which to us may seem arbitrary, but which, it is claimed, are based upon a sure foundation of experience and common sense. As a starting point in the judicial investigation, the *corpus delicti* must be proved by credible and sufficient evidence. In murder cases, the detailed confession of the accused is not competent to establish the *corpus delicti;* it only proves the acts which he describes, and not the mortal result of those acts; that—the death—must be still further confirmed by extraneous evidence.

§ 265. Persons produced as witnesses are divided into classes, according to the degree of confidence which is to be given to their testimony. The evidence of some is considered so untrustworthy that it is absolutely rejected. These are persons who have been convicted or even strongly suspected of perjury, falsehood, or suppression of evidence, and children under eight years of age. Our own system recognizes one of these disabilities, by shutting the witness box to all who have been convicted of felony. In the case of a young child, our practice would ascertain by preliminary questions whether he showed an appreciation of the meaning and sanction of an oath, and if so the examination would proceed. The other persons embraced in this class of incompetents, would be allowed by us to be sworn, and depose to the jury, while their veracity might be impeached, and their character destroyed by extraneous evidence, if possible.

The next class is that of suspicious witnesses, and includes accomplices of the accused in the crime, the injured party, informers, youths under eighteen years of age, persons connected in interest or relationship with the prisoner, or hostile to him, and those of a doubtful general character. All others are sufficient or good witnesses.

§ 266. The object of this particular classification of wit-

nesses will be seen when we consider the rules by which their testimony is compared and weighed, and the credence given to it. If two sufficient or good witnesses agree as to a fact of which they have the evidence of their senses, the testimony is considered as amounting to proof. The testimony of one such witness is half proof of the fact, and requires the substantiation of other independent evidence. If two suspicious witnesses concur, and corroborate each other in their depositions, it is deemed equal in effect to the testimony of one good or sufficient witness. Our law recognizes the correctness of the idea which lies at the basis of these apparently technical rules, yet it does not shape the principle into any definite provisions regulating the character and weight of evidence, but leaves it vague and undefined, to be applied in each particular case according to the discretion or caprice of judge or jury. It seems to me that the German criminal law—recognizing, as does our own, the fact that the testimony of a large class of persons demands a most careful scrutiny, to reject from it the large element of personal bias which causes it to swerve from the truth—is correct in generalizing the universal experience of mankind into these few simple and sharply defined rules, whose observance, though in a few instances it may work injustice against the prosecution, will in the long run produce the greatest number of satisfactory and correct results.

§ 267. In the nature of the evidence drawn from the witnesses, the German practice differs largely from that of our courts. The two systems are founded upon opposite principles. The direct testimony of eyewitnesses, and the description of all the physical facts which surround the case, are, of course, received. Circumstantial evidence is also admitted with the same force and effect, and under the same limitations as in England and America. It is in regard to the accused himself that the important difference exists. In our criminal trials no rule is more frequently quoted, and more strictly enforced, than the one which con-

mes the evidence to the very matter in issue. As I have already shown, this rule was devised from a careful respect for the rights of the defendant, to protect him from surprise at a time when he may be unable to explain suspicious and damaging circumstances, and also from the composition of the jury, who would with difficulty divest the case of extraneous facts, which had no direct bearing upon the question to be decided by them. The German courts are hampered by no such maxim, and there does not exist with them the necessity for its use.

§ 268. In prosecuting the investigation, the judge examines witnesses who have known the accused from childhood, and through his whole life; endeavors to trace, with the utmost particularity his history from his birth up to the time of arrest; dwells upon former suspicious acts or circumstances in which he may have been involved; learns his business, his property or means of livelihood, his station in life, his friends and associates, his habits, his religious opinions and practices; in short, everything which will tend to throw light upon his real character and disposition. As he approaches the time of the offence, he attempts to obtain a complete transcript of the prisoner's daily life, his every act and word. This is all to ascertain whether it be probable that he would have committed the crime charged against him. It is a practical application in a judicial problem of the argument *à priori*.

In collecting evidence, the examining judge does not restrict himself to that which involves the prisoner, but is equally careful to discover and secure all which is in his favor. The witnesses are examined separately, their depositions are reduced to writing by a notary, and attested and preserved for further use.

§ 269. While the judge is thus proceeding with the other witnesses, he will be conducting the examination of the accused himself, and more reliance is placed upon this portion of the proofs than upon all the rest. The examination

is in private, attended only by a notary. The nature of the charge is concealed from the prisoner, nor is he allowed to see the depositions of the witnesses, or informed as to the nature of their contents. The judge commences the interview, by exhorting him to tell the truth, and make a full disclosure. He is first asked if he knows why he is arrested, and if he professes to be ignorant, or gives a false or prevaricating reply, he is again warned to tell the truth. If he utterly refuse to answer, he is put upon a diet of bread and water in solitary confinement, until he relents. The questions and answers are carefully reduced to writing by the notary. The judge is very minute in his enquiries, gradually advancing from day to day from trivial questions to those of the utmost moment, inwrapping the culprit in a maze of interrogatories, apparently without definite design, but really all tending toward the grand final result, the complete breaking down of the defence. The examination is often a severe contest of intellects between the officer and the prisoner, the former endeavoring to conceal as far as possible the object and design of his questions, so as to afford little or no opportunity to anticipate the course of interrogatory, and thus to be prepared to meet it; and the latter, on the other hand, calling into action all his powers of mind to evade the scrutiny of the judge, to tell a reasonable and consistent story, and to remain firm to his narrative in the face of every attack. The published records of trials afford some most remarkable instances of the astuteness and caution of the judge, and the shrewdness of the prisoner, who would for days persist in the same account, and, when finally driven from it by the advancing outworks of his wily inquisitor, would abandon his position with the greatest apparent candor, concede that it was false, and intrench himself behind new ramparts, and, when thus dislodged from one stronghold after another, would at last confess the crime with the utmost particularity of detail, and in exact conformity with the statements of other witnesses.

Many guilty persons are thus driven by sheer weariness to give up the contest, and surrender at discretion. When the prisoner is very obstinate, and still persists in denying his guilt, the case may be protracted for a long time, and if he succeed in exhausting the patience of the judge, he may be sentenced to close confinement, even in chains for life, but will not be executed. In murder cases, the accused is brought to the scene of the homicide and placed before the dead body, and there, under the terror which may be naturally excited by these means, he is closely interrogated. Timorous and weak-minded persons may be frightened by such devices into a confession, or be betrayed into such admissions as, pursued with steadiness by the judge, will lead to a full disclosure; but with hardened criminals, to whom scenes of blood and violence are familiar, the melodramatic contrivance will have but little good result.

§ 270. Another means of startling the prisoner into an acknowledgment of the truth, is by confronting him with witnesses. Should the party, after numerous interviews, persist in a story known to the judge by the testimony of witnesses to be false, he is required on a particular examination to repeat his narrative with all the minuteness possible; and immediately, with the lie yet on his lips, and suddenly, he is confronted with some witness who has told the truth, perhaps an accomplice, of whose revelations he has been kept in entire ignorance. Being thus face to face with another person whom he knows to be acquainted with all the facts, he is again examined as to the same matters, and directed to explain and reconcile the discrepancies between his own account and that of the witness.

§ 271. A confession, to be a sufficient ground for a sentence of death, must be made in a most formal manner. It must be given at a regular interview, before a judge and notary, and subsequently repeated and confirmed on another day.

§ 272. The method thus pursued by the German crim-

inal judges, in their official investigations, is certainly productive of the most astonishing results. Those guilty of the most aggravated crimes, are generally brought to confession under the searching examination to which they are subjected. A portion are driven to the avowal by feelings of remorse, goaded on by the stings of an angry conscience. This class, as may be supposed, is by far the smallest of all. Others are influenced by a sentiment of shame at their futile attempts to escape the scrutiny of the examiner. They find themselves detected in lie after lie; no story, however plausible, can resist the keen perceptions of the judge; he penetrates all their subterfuges; and exposes them both to themselves and to the court as liars and perjurers. Others yet are induced by an expectation of mitigating the punishment of their crimes. But by far the greater number are driven to confess by sheer exhaustion, by a desperate feeling of inability to cope longer with their subtle antagonists; and they thus abandon the contest, and sullenly yield to their fate.

§ 273. The detail of this method of endeavoring to force the truth from the breast of the unwilling criminal by unfair advantages, by mental torture and terrible sights, is certainly most reprehensible. It shocks all our instincts and feelings of justice and humanity. The isolation of the suspected person after his arrest, the denial of legal counsel to aid and instruct him in shaping his defence, the concealment from him of the very nature of the charge, are all invasions of natural rights, which belong as well to the guilty as to the innocent. It is these particulars, so evidently oppressive, together with the artifices employed by the judge to entrap the party into contradictions in his replies, all of which are unnecessary excrescences upon the simple principle of a personal examination, which have brought that principle into such disrepute with English and American lawyers and legal writers.

§ 274. Another provision of these methods which is

alike unnecessary and injurious, is that requiring the confession of a person on trial before his conviction for a capital offence. There are no valid reasons by which this rule can be supported. All judicial evidence is imperfect, yet it is, and must be, continually acted upon. There is no distinction between the nature of the proofs which establish a murder, and that of those which establish a robbery. As the former is an offence of a higher grade, followed by a severer penalty, it is, of course, incumbent upon juries and judges in such cases to consider, compare, and weigh more carefully the facts presented to them, that, if possible, all sources of mistake may be eliminated. A heavier responsibility rests upon the triers in making their decision, demanding the utmost caution and calm deliberation; but the character and quality of the evidentiary facts upon which a verdict is based are the same for all criminal trials. A confession is not a more necessary step to conviction of a capital offence, than to that of larceny or an assault.

§ 275. The duties of the examining judge cease with the completion of the evidence. The prisoner is then allowed the assistance of an advocate, who consults with his client, examines the proofs, prepares a written defence and argument in his behalf. The evidence, together with the defence, is forwarded to the court itself, consisting of professional judges, who examine the case, and determine not only the degree of the crime, but the punishment to be inflicted. It will be seen that the judges who decide the questions of fact, do not have the aid of the personal inspection of the witnesses, which is so properly guaranteed to our criminal courts, and to parties accused, by the organic law; but this serious defect is partially supplied by the exceeding minuteness and particularity of the examination, both of the witnesses and of the prisoner, pursued by the inferior judges. But no careful attention to detail will atone for the great injustice done to a prisoner by subjecting him to the hazard of a decision affecting his life

or liberty, made by a court who are utter strangers to the witnesses.

§ 276. I have thus given a somewhat extended sketch of these German methods of criminal procedure, in order to afford a most useful comparison with our own. To those who have grown up under the influence of the English common law, the imperfections of this continental system are evident. Its excellences will appear no less remarkable to those who examine its workings and reflect upon the design of all judicial enquiries. The English trial is more dramatic, the German more thorough; the one searches after truth in an indirect way, rejecting many trustworthy sources, the other leaves no means untried, and in theory, and for the most part in practice, does not stop short of absolute certainty; the one anxiously throws its safeguards about the prisoner, to prevent the state from encroaching upon his rights, the other regards all those rights as forfeited, or subservient to the general welfare; the one convicts upon presumptions, the other studiously avoids all presumptions.

§ 277. The French criminal procedure is now a mixture of the English and continental forms, which are entirely unfitted to work together with any satisfactory result. Juries are used in criminal cases alone to decide upon the guilt or innocence of the accused. The court consists of several judges, the chief of whom is called the president. The foundation of the proceeding, the *acte d'accusation*, has already been described. On the trial the *acte* is first read to the court and jury. The witnesses for the prosecution are first examined, and are followed by those of the defence. The whole examination and cross-examination are conducted by the president. The French law renders incompetent as witnesses, the father and mother of the accused and all other ancestors in the direct ascending line, sons and daughters and all others in the direct descending line, brothers and sisters, husband and wife, and informers

who are rewarded for their disclosures. Informers who receive no recompense are permitted to testify, but their character must be explained to the jury. The rules of evidence resemble rather those of the German system than those of the English. In addition to the testimony of witnesses, the accused himself is interrogated. This examination is also conducted by the president. Although the code does not define the character of the proceeding, or prescribe the nature of the questions to be put by the court, yet in practice it is usual for the president to employ all the artifices possible upon a public trial to entrap and defeat the accused. His guilt is assumed in the structure and purport of the interrogatories; browbeating is continually resorted to; unfair advantages are taken and every means used to discomfit and break down the defendant. His past life is explored, a general investigation made into his character, habits, and pursuits, and, of course, much elicited strongly tending to prejudice any jury of laymen.

§ 278. In this system there is nothing to commend, everything to censure. The official position and duties of a presiding judge, especially in criminal trials, require that he should be removed far above even the appearance of partisanship, that he should hold the scales of justice with stern impartiality between the state and the accused. Where the facts are exclusively left to a distinct tribunal, the judge is to determine the law, without reference to the consequences to either party; with the question of guilt or innocence he has no connection. He is to observe that the proper forms of judicial proceeding are carefully regarded, and he should scrupulously refrain from influencing or attempting to influence the jury in forming their conclusions, and arriving at a verdict. The French procedure violates all of these salutary rules. The judge enters the arena as a partisan, and the jury must catch his evident leaning and desire for a conviction, so that the accused party is deprived

of the very safeguard which the jury affords to the criminal on trial.

### V. *Of the Judgment as the Result of the Decision of the Facts and the Law.*

§ 279. After the evidence has explained the facts to the court or jury, the next step in the orderly progress of an action is their decision, and the statement of the legal rule which is involved therein, and which demands a judgment establishing the relative rights and duties of the suitors. Whether the tribunals consist of judges and jury, or of judges alone, these two functions are different, and require to be separately performed. Rules of law are abstract propositions; but for their practical application in judicial trials, the circumstances out of which they spring, and the mutual relations of the parties, must be fully defined, before they can be made efficient in determining private rights.

§ 280. In the courts of law there are two methods in which the jury may perform their duties. In the one case, they may render a verdict, called special, by which they ascertain and set forth the entire facts, so as to present, as they have drawn it from the evidence, a complete history of the transactions referred to by the action, but do not determine which of the parties is entitled to a judgment. To the facts thus formally agreed upon, and officially announced to the court, the judges apply the proper rule of law, and finally decide the controversy, and adjudge in favor of one of the litigants.

§ 281. By the second and ordinary method, the judge announces the legal principles, prior to the decision of the jury, in the form of an oral charge addressed to them as a guide in their consideration of the evidence, and a help to reach a correct conclusion which shall definitely fix the rights and duties of the suitors. The charge thus delivered before the exact state of facts is officially ascertained, can-

not be a simple and single statement of the law which affects the case; it must be somewhat hypothetical, and accommodated to the various points of view from which the controversy may be viewed. The verdict thus rendered is said to be general, declaring absolutely for which party the judgment must be given, and defining the particular property, real or personal, or the amount of pecuniary damages included therein.

§ 282. The judges of those courts which decide the whole controversy, possessing at once a knowledge of the law which is to govern them, and of the facts to which these rules are appropriate, must follow the same order, although they may not keep the two elements which unite in the judgment, so entirely distinct.

§ 283. In England and in America there is ample provision made for a review in a more solemn and authoritative manner of the rulings of law made by the judge at the trial. The facts, when once passed upon by a jury, are definitely settled and taken to be the absolute truth, except in those few instances where the triers had fallen into a palpable mistake. By far the greatest portion of the duties of the Superior Courts in England and America, consists in reviewing the propositions of law made by a judge at the trial, affirming them and the judgment if they were correct, or overruling them, reversing the judgment, and ordering a new trial, if they were erroneous.

§ 284. These decisions of the courts thus solemnly examining the hasty rulings at the trial, constitute the formal and authoritative utterances of the unwritten jurisprudence of the nation. In the actual determination of the rule of law in each particular action before them, the judges have as guides the precedents which have been established by the same or other tribunals in former cases, and which are generally contained in published volumes of official reports. These precedents, extending back to the infancy of our jurisprudence, are the foundations of the law, upon which

successive generations of judges have built up the growing fabric. The rules which they contain are often exactly applicable to the circumstances of the particular case under consideration, when the courts have only to follow the course marked out for them; but they commonly require to be modified, extended, or restricted, by processes of reasoning to meet analogous instead of identical facts.

§ 285. The effect of the judgment of the court upon the rights and duties of the parties varies with the nature of the controversy and the subject matter involved in the dispute. In a large class of cases it consists in a judicial order or direction that the defeated suitor shall pay to the other a sum of money, which payment a ministerial officer, generally the sheriff, may enforce by seizing and selling a sufficient amount of the judgment debtor's property, and even in certain actions, by confining his person. Another class requires the delivery of specific chattels, or the transfer of the possession of lands, and obedience may be compelled by the sheriff. Judgments in equitable actions are more particular and comprehensive in their details, depending entirely upon the peculiar features of each case, and are enforced under the direction of the court itself.

One effect common to judgments in all actions regularly brought and prosecuted should be particularly noticed. As long as a judgment stands unreversed by a higher court, it is absolutely conclusive as to the facts in dispute in the action, and the rights of the parties depending upon those facts; it cannot be doubted or denied or questioned in any other proceeding, but must be taken as establishing absolute verity in the controversy. When once a judgment has been rendered, the party who deems himself aggrieved must take some direct proceeding to procure it to be reversed or set aside; otherwise he must submit to the decision of the court, and all the world must regard that decision in the particular action as the truth. This rule is founded upon

the dictates of public policy, which seeks to put an end to controversies, to reach some fixed and stable results, and to prevent doubts and uncertainty as to the ownership of property and the relations of individuals to each other and to the state.

## CHAPTER III.

### THE UNWRITTEN LAW, OR LAW OF JUDICIAL DECISION: ITS FORMS, METHODS, AND SPIRIT OF DEVELOPMENT.

§ 286. I HAVE described in the preceding chapter the several instruments and means by and through which the plastic unwritten jurisprudence has been built up, the courts with their various branches and classes, and the actions by which this judicial machinery is put in motion: I shall now proceed to examine somewhat more carefully the nature and characteristics of this legal development, the methods by which it has been evolved, and the form which it has assumed, and shall compare this product with a municipal law entirely embodied in statutes. The principle of legal development is common to the systems of all countries which have emerged from a condition of barbarism, and entered upon a course of progressive improvement. As a nation's law is most intimately connected with their civilization, and is in some sort an exponent of the people's attainment in general culture, it is natural to find it partaking of the same gradual growth, impressed by many of the same influences, culminating at the same epoch, and declining with the same weakness. As civilization is a product of religion, philosophy, letters, arts, trade, commerce, government, and above all, the ethnic life of a people, so do these elements enter into and shape their law. In its own infancy, and that of the state, a system of juris-

prudence is rude, severe, simple, arbitrary, reflecting the wants, customs, and habits of thought of the individual citizens. It embraces but a few subjects, is not reduced to general principles and maxims, but its fragmentary rules are devised to answer the few popular needs. It endeavors to provide some remedy for those evils to which the community is exposed, but consciously makes no provision for the future and all of its yet unborn interests.

§ 287. Still, in the institutions of this imperfect law lie the germs of a development coextensive, in scope and perfectness, with the capacity and inherent life of the national stock. All tribes and nations, even in their most uncultivated state, do not show the same power to organize legal systems, and unfold legal ideas. The Romans confessedly hold the first rank in their aptitude for legislation. In the earliest ages of their existence as a distinct community, we find them possessing a municipal law, rude and severe enough, but relating to most of the important divisions of property and personal rights which are contained in the philosophical systems of the moderns. Semi-barbarous as they undoubtedly were, their jurisprudence was a comprehensive and enlightened code, when compared with those promulgated by the Franks after their conquest of the Gallic province, under the names of the Salic and Ripuarian laws, or those issued by the early Saxon or Danish kings, all of which related chiefly to violent injuries to persons, while they merely glanced at the rights of property and the methods of administering justice.

§ 288. The municipal laws of the principal European countries started from small and meagre beginnings, and have gradually and steadily progressed, until they have reached, or are approaching their culminating point. This growth has been continuous, broken by no great faults or displacements in the successive strata, extending with one common life from the germ to the matured fruit. This is particularly true of the jurisprudence of Rome and of England.

§ 289. The law, reflecting and expressing the advancing civilization of the people, has been evolved by means of statutes and judicial decisions. Certainly in the Roman Republic and the earlier periods of the Empire, and in England (and I believe in all the states of modern Europe), the action of courts or its equivalent has exerted immeasurably the greater influence upon this onward march. As the municipal law of Rome, extending through a completed life, from its birth amid the barbarous Latin tribes who collected on the sacred hills by the banks of the Tiber, to its death and entombment in the codes of Justinian, and that of England, still full of energy and vitality, with power to go forward toward yet unattained degrees of perfection, exhibit in the clearest light the workings of this principle of self-development, I shall confine myself in the present chapter to tracing the method of their growth, with only incidental allusions to the legislation of other European countries. In fact, these two systems may be taken as the best exemplifications of a national jurisprudence. Having much in common, both in ideas and forms, they yet present strong and most interesting contrasts. They are essentially the products of peoples animated with a different ethnic life. The one, through much struggle and many severe contests, has preserved and perfected the grand thought of individual freedom; the other has, from the beginning, maintained its allegiance to the imposing idea of national power.

§ 290. One very important element of the law, as a source of many positive rules and principles, and a modifier of the social organization of the countries of Modern Europe, was the feudal system. A sufficiently particular account of this phase of civilization is given in the second part of this work, and I now refer to it simply as one of the fruitful seeds of legal ideas. Its effect upon society, the different ranks, classes, and status of the citizens, and the forms of government, I do not stop to notice. The modifying influence which it exerted upon private jurisprudence

has been almost entirely confined to those portions which relate to the property in, and rights over, lands. This system, taking its distant origin, without doubt, from the tribal customs of the Germans, began its growth long after the barbarian conquest, and attained its highest point of splendor and power in the 10th, 11th, and 12th centuries. It spread over the whole of Western and Southern Europe, and has left a deposit of its principles in the legislation of all countries from Italy to England. Hence we have borrowed our divisions of property into real and personal; the rules which prescribe the kinds of interest which a person may hold in lands, and those which regulate descents and inheritances. I would not be understood to mean that the feudal customs themselves embraced all, or any great part of the minute and intricate regulations by which the modern English law governs this species of property, so that they could be transferred and incorporated bodily into our jurisprudence; but from those customs as premises, the courts, by logical process of reasoning, have constructed most of that portion of our municipal law to which I refer, except when the systematic development has been interfered with, and broken in upon, by statutes.

§ 291. The private law of Italy, Spain, Germany, France, and other Western countries of the European continent, is based principally upon that of Rome, so that a thorough study of the latter is as necessary to the understanding of the municipal law of these nations, as that of the English is to an American. No portion of legal history is more interesting than that which traces the wide-spread effect of Roman jurisprudence upon modern peoples; which watches it struggling through opposing influences of the greatest power, until it finally attained its position as the foundation of so many national systems. Connected with, and modifying this principal element in the continental states, is a large admixture of feudal principles and local or general customs. Before the codification under Napoleon I., it can

hardly be said that France possessed any municipal law, in the strict use of the term. Its jurisprudence was so broken up by provincial customs, and administered by local courts, or parliaments, that the unity necessary to the idea of a national law was lost. The condition of England would undoubtedly have been the same, had the Saxon dynasty and institutions, with their county courts acting independently of each other, been perpetuated. This organization sufficed for the imperfect civilization of our rude ancestors, but in time, as society should progress, and these folk courts should be replaced by more effective tribunals, around each as a centre, there would have sprung up a separate system of law. Indeed, England is not, even at the present day, without some evident traces of this effect. Certain counties now possess peculiar customs, which are recognized as law within their limits, but do not extend to the whole kingdom. The Norman conquest introduced the idea of an empire, and made an imperial legislature, imperial courts, and an uniform imperial code of laws possible.

§ 292. The law of England and of the American States is most composite in its nature. It has no one predominant element underlying it, and giving shape and color to all other portions which have been added from time to time; nothing which bears to it the relation which the Roman holds to the French jurisprudence. Still, it has its own peculiar character most clearly marked, a character which distinguishes it from the legislation of all other European nations. Whatever is drawn in from foreign sources, loses its individuality, and becomes blended with the general mass as though it were the product of native growth. Saxon, feudal, Roman principles, even those borrowed from the public law, suffer a change and are made English. Our municipal law is no patchwork; its parts are mutually dependent; no portion could be lopped off without disturbing the balance of the whole.

§ 293. The earliest contributions were from the Saxons.

Yet we have preserved of them only certain institutions and ideas, rather than any positive principles and rules. These institutions and ideas indeed pervade and give tone to the entire system, making themselves felt in the whole course of legislation, whether judicial or parliamentary; for they include the trial by jury, the interference of the people in the decision of judicial contests, the care for individual freedom, and the preservation of local self-government. Following the Saxons, the Normans gave the idea of nationality, the organization of the courts, and borrowed from Rome and recast in an English mould the forms of legal and equitable actions. During the reign of the Norman kings, the feudal régime was perfected, which furnished the foundation for the law of real property. Mingled with these elements, are many portions drawn from the Roman law; yet it cannot be said that they have formed any great part of the fundamental principles and forms of our jurisprudence; they have rather been woven into the fabric, adding beauty, completeness, and utility to the whole. But far the greatest number of our legal rules have been invented or evolved from former admitted premises, to meet the requirements of a progressive civilization.

§ 294. Thus the municipal law has constantly reflected the peculiar character of the national culture. During the earlier periods of its history, after the full establishment of the feudal system, and while its influence was most keenly felt upon all classes of society, the power and interests of the hierarchal aristocracy were greatly predominant in the nation. The feudal lords held vast domains and possessed privileges which rendered them only less than independent sovereigns; the mass of the people were their tenants, either honorable or slavish. During this epoch, the general course of legislation, both that emanating from the parliaments and that wrought out by the courts, had a tendency to preserve and strengthen these privileges. Rules were devised which retained lands in the hands of the feudal owners;

transfers were impeded by vexatious restrictions; estates were carefully preserved in families by inheritances; the rights of creditors were subordinated to those of the proprietor. As there was little of commerce, trade, or manufactures, the courts were not employed in developing the law of personal property, and the endeavors made by parliament to control these feeble and struggling interests, were suggested by an entire ignorance of political economy, and of the measures which contribute to the welfare of the state. But as the overpowering influence of the feudal aristocracy began to wane, the law gave evidence of the change, by devising means to evade the restrictions which had been thrown over landed property in the interest of the great owners. The initiative was made by the Court of Chancery through the introduction of uses, or beneficiary estates, which have been described in the preceding chapter, by which transfers were made easy and frequent, and the heavy feudal burdens were removed. The superior lords, however, whose rights were thus invaded, rallied in their defence, and procured a statute of parliament to be passed in the reign of Henry VIII., with the design to destroy this innovation so contrary to the feudal ideas, and restore the original policy. But the progress of the nation is more powerful than the edicts of legislatures, and irresistibly carries with it parliaments, courts, institutions, and laws. This statute opposed but a feeble barrier to the improvements in the English jurisprudence, for the courts found means to evade its intention and preserve the beneficiary estates, and, legislating upon it as a basis, gradually have constructed the rules and maxims of that portion of the municipal law which relates to real property, as they have existed to the present day, except when modifications have been introduced by the legislature. While one grand division of the law of property was thus built up on the foundation of feudal customs, greatly modified by an idea borrowed from Rome, the other branch, which relates to ownership in

movables, and the formation, interpretation, and enforcement of personal contracts, was left meagre and imperfect, yet it was sufficient for the popular wants. But after the governmental policy of England was settled by the great rebellion and the revolution that banished the House of Stuart, and the civil liberty of the people was ensured, the national energies were directed into new channels. The cosmopolitan interests of commerce, of trade, of manufactures, with their countless multitude of relations and forms of business and contracts, became predominant. Personal property has arisen from its position of comparative obscurity, and asserted its superiority over lands. This change furnished new work for courts and legislatures, and the English judiciary has since been engaged in completing a system of the law of movables and contracts, including that which particularly refers to the merchant and mariner, until now their law reflects their national character of a trading and commercial people. Thus we can discern from this sketch the essential features of our municipal law, that it is conservative in retaining a strong hold on the past, progressive as it constantly reaches forward to the future.

§ 295. My especial purpose in the present chapter is to illustrate the methods in which the courts have addressed themselves to their duties in producing this result; how they have seized new material and worked it up into the rising structure; how they have extended the original narrow and arbitrary principles, until they have developed into an all-embracing jurisprudence, free, elastic, self-adapting, reproductive, containing in its own bosom the seeds of an immortal growth.

I have already described in the preceding chapter the instrumentalities employed in this progressive work, and have shown that it was not accomplished by formal legislation, but by the trial and decision of individual cases as they arose for adjudication. It is necessary to the full comprehension of the genius of our legal system, and the per-

ception of the peculiar life which animates it, that we should form a clear conception of that which differences the action of our courts and of our legislatures.

§ 296. Under our polity, both courts and parliaments legislate. It is an entire misconception of the functions of the judicial tribunals, to describe them as wanting the legislative power, but as possessing only the capacity to declare the law to exist, as though from time immemorial a legal principle or rule had lain hidden and unnoticed, awaiting a discoverer, until an adventurous judge had brought it to light. A large part of the law did indeed lie hidden, existing in a possible state, in old admitted principles, but only as the future harvests lie enwrapped in a single kernel of grain. And those portions which owe their existence as positive rules to the enactments of legislatures, were also as truly and potentially embraced in earlier and more general maxims, as those which have emanated from courts. The legislature, as well as the judges, have but followed the leadings of the national life; they have both been compelled by the same vital forces in their work of production.

§ 297. The English courts and parliament received the municipal law several hundred years ago, an incomplete and meagre system in all respects; they have both since been constantly engaged in building upon this foundation; they exhibit to us now a structure, vast, symmetrical, harmonizing in its grand divisions, equally harmonious in its minutest details. Each day they have added something to the rising work. They have drawn their materials from all quarters; from historical institutions; from pure ethical principles; from arbitrary customs; from philosophical deductions; from considerations of mere expediency and from religion itself. They have passed over into foreign lands in search of products that will supply the native want, borrowing from imperial Rome; from the codes of the Middle Age merchants; from the tribunals of all civilized countries. They have not disdained to visit the shops and

counting houses, the marts and exchanges of their own tradesmen and manufacturers, and adopt their customs and modes of business, and amalgamate them with the general law. They have banished the ancient arbitrariness, and caused the whole mass to be penetrated and infused with the presence of a pure morality.

§ 298. That the greater part of this immense and most beneficial result has been accomplished by the persistent action of the courts, no one will question, and it is folly, a mere perversion of language to support a theory, to say that the tribunals have not legislated as really and as effectively as has the parliament. Yet while both have truly created law, the respective methods, which, from their constitution and peculiar duties, they have employed, are essentially different. The legislation of the one is conscious, that of the other unconscious. The legislature perceives some rule of law which is a disturbing force in the system, working injustice to individuals or communities; its attention is drawn to the subject by the complaints of the sufferers; it examines, consults, deliberates, not so much with a desire to preserve the whole jurisprudence harmonious and logical, but rather with a hope to repress the evil and produce an immediate benefit. It embodies its decision, which is generally based upon motives of mere expediency, in a repealing statute, and the obnoxious rule ceases at once to exist, it is no longer law. Or, in the progress of society, new complications of business have arisen, new ideas have been widely disseminated, and new needs are felt. To meet the exigency, the legislature enacts a positive statute, creating some additional regulation, which is imposed, fully developed and energetic as law, upon the whole state. But as human foresight is imperfect and limited, and the results of this legislation cannot be clearly apprehended, it not unfrequently happens that the statute is followed by consequences entirely unexpected by its framers, and which are felt throughout the whole extent of the legal relations of the

people. In correcting the single evil, or supplying the one need, the way may have been opened for multitudes more formidable.

§ 299. The distinguishing characteristic of the functions of a legislator, is, that he consciously presents to himself a particular end to be accomplished, in modifying, restricting, or adding to the existing rules of the municipal law. The distinguishing characteristic of his work is, that it is perfected, so far as any inherent capacity for growth and adaptation in itself is concerned, the moment it passes into the condition of positive law. It has no pliability, cannot contract or expand, admits of no exceptions; no power but the one creating, can avail to alter or repeal it.

§ 300. The methods of the courts are all different. The judges sometimes do not claim to possess, and do not often assume, the power in terms and professedly to repeal an old well-established legal rule or principle; nor do they consciously and with avowed purpose undertake to add the new. Their work of reconstruction and creation is rather inferential and consequential, than direct. In performing their peculiar duties, the *primary* work is not to model the national jurisprudence, but to do justice between suitors according to legal forms and maxims. It is true that this is far from their most important function, but it is only through it that the greater national result of perfecting the whole law is evolved.

§ 301. When a controversy is brought before the courts for decision, they have, as the groundwork on which to proceed, only the facts of the particular case. These circumstances comprehend certain relations of the parties, which are to be investigated and adjusted, as far as possible, according to the requirements of the law acknowledged as already existing. Whenever, as will continually happen, some relation is discovered which has been left unprovided for by any known rule, the judicial power of legislation is called into action, and the necessary formula is constructed,

never arbitrarily, but rather as a reasonable, necessary, and logical inference, deduced from familiar principles.

§ 302. The peculiar tone and character of the reasoning which the courts have adopted in this process of evolving the new out from the old, the particular and practical out from the general, has, of course, varied greatly with the condition of the whole nation, with its state of advancement, and its conceptions of right and justice. Here it is that the judicial tribunals have felt most keenly the power of the national life, and the influences of a perfecting civilization. In former times, the judges approached the investigation of the questions presented to them with narrow and contracted views, and their deductions were cast in the mould of the severest logic; now a more liberal and expanded policy is followed; greater breadth is permitted; cases are conformed to general principles; results are made more uniform and harmonious. By the freer admission of these ideas of right, the courts have brought the whole jurisprudence into a nearer agreement with the maxims of a perfect morality, and have thus imparted to it somewhat of the spirit of the ethical portion of the Christian religion.

§ 303. But we will examine a little closer the general course of this judicial action. In no single case before them, do the judges assume to lay down a rule which shall embrace all others of an analogous character; their duty is confined simply to the discussion and fixing of the legal rights and duties of the parties growing out from the exact circumstances of the particular controversy. They are thus plainly distinguished from the parliamentary legislator; they approach the law from a different standpoint, and are relieved from much of the heavy responsibility which rests upon him. He legislates directly for a nation, sure that his work will affect, in one way or another, the entire people; they legislate directly for the parties to a legal action, without reference to the consequences upon others, and not knowing whether a similar case will ever again arise. It is

true that their decisions or enactments, which primarily have reference to the individuals who are suitors before them, are extended to all others who may be in exactly the same condition; but this result, however much it may transcend the other in its importance to the community, is, so far as the courts themselves are concerned, secondary, and does not present itself as a controlling element in shaping their announcements of the law.

§ 304. As a single decision is confined in its scope to the legal rules involved in the mutual relations of the parties to one judicial action, and in those of persons identically situated, it will, in general, produce a much less powerful effect for good or evil, upon the whole jurisprudence, than a statute, but still it adds its contribution to the total mass of the unwritten law, which thus grows evenly and slowly, and the new portions are kept in constant and intimate connection with the old. Thus it becomes possible for persons entering into relations unprovided for by any existing positive rules, to infer with a great degree of certainty, what the law will be that is to control them. They have the same premises which the courts assume, and applying a like course of reasoning, they can arrive beforehand at the conclusions which the judges will afterward reach. This process of anticipating the action of the tribunals forms the principal duty of counsel in advising clients upon their legal rights; and herein lies one of the great points of superiority of the unwritten law over statutes and codes, a subject to which I shall refer more particularly in a subsequent part of this chapter.

§ 305. In deciding a particular case, or, in other words, in announcing the rule by which the rights and duties of the parties are established, the courts, to a great extent, are controlled by precedents; and this is only saying that the existing law is generally binding upon judges, as well as upon legislators, and the whole community. Precedents are simply former decisions, made by competent courts, and

preserved either in the memory of judges and lawyers, or, as is usual, collected in printed volumes, known as reports. The principles of law contained in these precedents, have lost their character of mere argumentative deductions, and passing into the limits of positive jurisprudence, have become the bases upon which new portions of the structure are built up. Over them the judges have virtually the same control which the legislature has over statutes, yet this supervision is generally exercised in a different manner.

§ 306. In the investigation of a case pending before them, in endeavoring to find the proper rule of law to apply to its circumstances, the courts may be met by a precedent, which, involving the same or analogous facts, would serve as a ready and sure guide for their judgment. If this precedent be acknowledged, the duty of the judges is simple and easy; they have only to conform their application of the law to the former decision, and bring the case under its controlling power. As the national jurisprudence of England and America has been greatly extended, and its principles already multiplied, it constantly happens that the judicial tribunals have only to exercise this somewhat subordinate function of applying familiar rules, instead of calling into play their more important power of creating or reconstructing the law. By far the larger number of the controversies which engage the attention of the courts, depend in whole or in part, for their correct issue, upon some decision already made or statute already passed.

§ 307. On the other hand, the judges, instead of implicitly yielding to the requirements of the former precedent, may be satisfied that, although a part of the national jurisprudence, it is essentially wrong; that it is opposed to other well-settled principles; that it is a disturbing force in the otherwise harmonious system, and that, if followed, the evil consequences will spread wider and wider. To avoid so disastrous a result, and to preserve the law symmetrical and uniform, they have two courses to pursue. They may

in terms and intentionally overrule and nullify the obnoxious decision, and repeal the rule established by it. This incontestable power of the courts is, however, only exerted in instances where the incorrectness of the precedent is glaring, and has been used much more frequently by American than by English courts. Some writers, and even some judges have denied that the power of the courts to overrule a former decision resembles that of the legislature to repeal a statute. Influenced by the theory that the courts possess no creative function, but only a capacity to declare the law, which is assumed to exist as a perfect whole above and behind these tribunals, they maintain that the principle established by the faulty precedent was never clothed with the attributes of law. This, however, is a mere evasion; the constant experience of judges, lawyers, and suitors demonstrates its unsoundness. As long as the obnoxious precedent stands unassailed, it has all the elements of law; it determines individual rights; it may be followed, instead of being rejected by the courts, and thus its rule may be repeatedly stamped with official approbation. In fact, not a few of the positive maxims of our jurisprudence universally admitted, are based upon precedents wrongly decided, to which the judges have preferred to yield, rather than disturb the existing rights of property. It cannot, therefore, with any reason be denied, that the courts of England and America do possess a power, seldom, however, exercised, of directly repealing an incorrect rule of the unwritten law, and substituting another in its stead, as completely and effectually as is held by parliament or legislature.

§ 308. It is one of the chief excellences of this division of the national jurisprudence that this function is rarely used, for the judges are inclined to resolve the difficulty by another method, as favorable to suitors, and more advantageous to the law, than the one just described. This consists in limiting and circumscribing the effect of the precedent, in discovering some element of difference, small, per-

haps, between it and the case under examination, by which the latter may be distinguished and withdrawn from the other's control. From this starting point of departure, the courts will proceed cautiously and smoothly, until, after a series of decisions, each somewhat in advance of the preceding one, the law is brought back to its true position, and the fault is corrected. It is in this manner that the old rules, while they are made the foundations of the new work, are gradually superseded, as they become unfitted, in the national progress, to subserve the wants of the people. There is no sudden break or shock; at no given point can it be assumed that a radical change has been made; and still the result is evident, that useless and cumbrous rubbish, once valuable as portions of the jurisprudence, is constantly being laid aside, and replaced by other material, which will, in turn, suffer the same fate, when it has accomplished its purpose.

§ 309. But it may happen, and in the earlier stages of the developing process of any branch of the law, it often did happen, that the courts had no direct or analogous judicial precedents to guide them in their decisions. Here, then, was afforded another opportunity for practical, if not avowed legislation. Here came into play the peculiar distinctive functions of these tribunals in unfolding the unwritten or common law. A new rule must be created; and as the judges cannot rely upon any direct or analogous precedents as the basis of their judgments, they must fall back for their premises, upon general principles, either contained in some peculiar national institutions, or embodied in natural right and equity. An example of the former of these premises may be found in the customs of the feudal system, from which, by pure logical deduction, the rules of real estate law, as they existed in England before being modified by statutes, were originally inferred. In the doctrines of the natural law, the judges have assumed an ample foundation on which to build up those portions of our municipal

jurisprudence which regulate the vast interests connected with personal property and contracts. One of the maxims of universal justice, early adopted as a positive rule, that no legal wrong committed or suffered, should be left without an adequate remedy, has been fruitful in important and comprehensive results. Resting upon this equitable principle, through the aid of the actions of trespass on the case and of assumpsit, which I have already described as being so elastic that they could be easily adapted to a vast variety of circumstances, the judges of England and America have been able to construct, from almost no definite precedents, the great mass of commercial and mercantile law. Thus, to illustrate, it was mainly through the agency of enlightened courts, that the numerous rules which regulate the use and effect of promissory notes and bills of exchange, and establish the rights and liabilities of the various parties to these species of commercial contracts, have been evolved and firmly settled. It must not be supposed that these contracts were originally introduced by the judiciary; they had become familiar to merchants, and a mercantile usage had grown up respecting them, which, however, had no binding authority as law, until the courts intervened, and, applying to these customs the test of sound reason, rejected such as were wrong, and made strictly legal such as were just. In the exercise of this power of judicial legislation, Lord Holt, chief justice of the King's Bench, in the reign of William and Mary, in deciding a celebrated case, borrowed from the Roman law, and incorporated into the English jurisprudence, that entire branch which relates to a species of contract called bailments, which has since been greatly extended by the labors of other judges. In like manner, the law of marine, fire, and life insurance, has been developed in a comparatively recent period. Indeed, by far the greater part of the practical rules which relate to contracts of all descriptions, except those in writing and sealed, have been evolved from a few general principles, which are them-

selves a part of that universal code, which the Romans called *jus gentium*, and the moderns denominate the law of nature. Hence there is a very marked general agreement between this portion of the national jurisprudence of all enlightened countries; indeed it is not national; it is cosmopolitan, since reason and justice are not restrained by the boundaries of different lands, or the divisions of different races.

§ 310. From the review of the general course of procedure of courts given in the preceding chapter, and the foregoing statement of the theory and essential characteristics of their action, it is evident that they have played an important part in the work of creating the municipal law of England and America. From the comparison between their methods and those of legislative bodies, it is equally plain that they have an inherent power and capacity to contribute to the orderly and steady development of the national jurisprudence, which is not possessed by parliaments and legislatures. Indeed, it seems hardly possible, that a popular, deliberative assembly, made up of delegates from various classes of society, and representing different and often conflicting interests, unskilled in the science of law, and often unfamiliar with the details of the national history and the working out of the grand principles which have exerted so powerful an influence upon the national civilization, should be able to construct a symmetrical and complete jurisprudence, or even to effect harmonious changes and additions in one already existing. This incapacity is so fully understood and acknowledged, that, when propositions have been pending before the English parliament or American legislatures, to enact comprehensive amendments to the municipal law, it has been the almost invariable practice to commit the whole subject to experienced jurists, and to accept the result of their investigations as the expressions of the legislative will.

§ 311. When we compare that portion of our jurisprudence, which has found its authoritative expression in stat-

utes, with that embodied in the judicial decision, we shall see, from a very cursory examination, that the latter is united, self-dependent, logical, steadily improving, yielding continually to the influence of equitable ideas; in short, that it completely reflects the contemporaneous civilization, keeps step with the great national wants, aids the national advance, and is everywhere infused with the ethnic life of the people. It presents the fact of a development commensurate with the requirements of society, in the highest degree. The organization and functions of our courts render this result not only natural but necessary.

§ 312. The statute law of England and America, on the contrary, is in a great measure fragmentary, and sometimes, indeed, contradictory. Not being based upon any necessary premises found in the national institutions or in the maxims of natural justice, and worked out from these by a logical sequence of steps, it is often arbitrary and difficult to be understood, as its meaning must be gathered mainly from the mere language of the enactment, unaided by any great underlying principles; it often breaks in upon the symmetry of the whole body of jurisprudence, and introduces confusion where the intention was simply to supply useful amendments.

§ 313. Other modern nations of Europe have, to a certain extent, used the same means of developing a common law, or law of judicial decision, but in none of them have the courts possessed that transcendent power and influence which they enjoy in England and America. Their judges may, perhaps, have been clothed with more arbitrary discretion in some particulars, but the system of free courts, untrammelled by governmental authority, independent of the executive or legislature in the exercise of their judicial functions, producing a complete liberal and reasonable municipal law, has come to its highest point of excellence in these countries, where the principles of freedom have been most deeply planted in the national life and most carefully

guarded in the national history. No fact in our legal history better illustrates this truth than the gradual extinction of the institution of serfdom in England, through the successive limitations placed upon it by the judiciary; but as this subject will be treated of at large in Part Third, when I come to speak of personal rights, I will postpone to that place any further mention of it than this reference.

§ 314. The same principle of a judicial development of the great body of the municipal law, which so strongly characterizes our own institutions, also lay at the foundation of the Roman jurisprudence, and, beyond all question, the acknowledged superiority of that system is due to the opportunity thus given for the Roman ideas of order and power to unfold themselves in a natural and free method.

§ 315. In the earliest stages of the Roman commonwealth, there existed customs, according to which justice was administered. The first important step in the progress was the collection of these customs and their reduction to a statute or codified form in the XII. Tables, which were promulgated in the year 451 B. C. Subsequently to this epoch, and continuing through the entire period of the rise of the system toward perfection, we find at the imperial city and in the provinces, important magistrates, prætors, and presidents, who contributed largely to the production of the unwritten jurisprudence. Side by side with these judicial officers was a class of legal writers, who made the law a special study, and who were known as the jurisconsults. How far the expositions and writings of these jurists were received as positive law, necessarily binding upon the citizens, it is difficult to say. With us, the conclusions of text writers, when they do not rest entirely upon decided cases, are at best merely argumentative; however reasonable they may appear, however consistent with equity and justice and established principles, they cannot be called in any full sense of the term, *Law*, until they have received the sanction of some competent tribunal. At a certain

period of the Roman empire, the productions of some of these jurists possessed a higher value than the works of our text writers. By an edict of the Emperor Valentinian III., in the year 426 A. D., the prætor was ordered to conform his decisions to the writings of five distinguished jurisconsults, who had flourished long before, or, in case of a disagreement between them, to a particular one of their number, named in the statute. But this was in the decadence of the Roman jurisprudence, after its life had died out and it was only existing as a splendid memento of a former grandeur. But beyond all question the jurists were a great aid to the magistrates in the discharge of their official duties. They were a class of trained men, accustomed to the theory and practice of jurisprudence, occupied in examining and giving opinions upon particular cases presented to them, and in writing treatises upon entire branches or departments of the law. After the Greek philosophy was studied at Rome, they infused a more genial and comprehensive spirit into legal science, and brought it into closer relations with natural justice. In fact, it is not in decisions of prætors preserved untouched, like the reports of our own courts, that the Roman law has been handed down to us; it is rather to the works of the principal jurists, which have escaped destruction, or which were incorporated in the compilations of Justinian, that we must go for our knowledge of that law as it once existed a living and working system.

§ 316. In the same manner, if the direct work of the English and American courts, the long series of their decisions, should be destroyed, succeeding generations could easily collect our whole jurisprudence from the treatises of such writers as Coke, Blackstone, Comyn, Preston, Kent, Story, Parsons, and many others. Yet it cannot be said that these men, great and illustrious though they were, as mere authors played any immediate part in creating the English and American municipal law. They have collected the scattered decisions of judges, extracted their essential

× Gaius, Papinianus, Paulus, Ulpianus and Modestinus.

• Papinianus

principles, arranged, methodized, classified them; have shown their mutual connection and dependence, and have thus presented the system, or some special branch of it, as a whole. They have even gone farther, and by this very process of systematizing, as well as by new applications and suggestions, have greatly aided subsequent judges. I believe, and in this opinion I have the authority of Hugo, that the office of the Roman jurisconsults in perfecting the law, was quite analogous to that of our judicial writers.

§ 317. Notwithstanding the very important functions of these learned men, in collating, classifying, and suggesting, the magistrates with the Romans, like the judges with us, were the authorized creators and declarers of the unwritten law, or law of judicial decision. But while the action of the prætors in developing the law was essentially the same as that of our Superior Courts, the method which they adopted to accomplish the object was somewhat different in form, although, as I believe, identical in principle. I have shown in the preceding chapter, that, in the actual judicial work, these magistrates invented and used actions, which bore a striking resemblance in form and design to those employed in the English procedure. But the prætors did not announce and elaborately set forth the law by judgments or opinions rendered in each particular case. Instead of waiting until a controversy should be presented to them, to consider the facts, and deduce and apply the proper rule, they endeavored to anticipate the questions which should arise, and devise general maxims which should include all particular instances. As in the progress of the people these were found insufficient, others were from time to time added, and thus the municipal law was constantly accumulating its resources. The magistrates were chosen for a short term of office, and at the time of entering upon their duties, they published a formal statement known as the edict, in which they announced the legal principles and rules by which they proposed to be governed in the admin-

istration of justice. At first, each prætor as he entered upon office, unquestionably had the power to publish an edict entirely different from that of his predecessors; but the custom grew up, and was at length firmly established, that each new magistrate should adopt the legislation of the one whom he succeeded, improving it as he saw proper, by additions and amendments. By this means the edict of the prætor became connected and continuous, constantly increasing in extent and comprehensiveness, and including in itself the essential features of that portion of the municipal law which was the result of judicial decision. A more detailed examination of the manner in which the Roman law grew, would require me to anticipate a subject which belongs to another chapter. What I have already stated is sufficient to illustrate the statement that the Roman and the English systems were mainly evolved in an identical way, by a judiciary working independent of the legislature; while the statute was subordinate and practically of less moment in creating the rules of private law. This, however, was true only during the ages of the growth and perfection of the republic and empire and of its jurisprudence. When both began to decline, and the animating life was extinct, and progress ceased, the statutes or constitutions of the emperors became almost the only source of law. The magistrates were left only with the official duty of expounding and applying the recorded will of the head of the state; and finally the whole mass, statute and judicial, was collected into the vast compilations of Justinian.

§ 318. In the progress of law toward equity and justice, Christianity has certainly exerted a controlling influence. The morality of the gospel is so pure, the precepts which issued from the mouth of the Divine Teacher and became the basis of religion, are so marked by perfect justice and right, that it is but natural, that nations who accept Christianity as true, should strive to conform to this high model, the rules which govern the intercourse of citizens, and

prescribe their rights and duties in all relations. Still Christianity has always acted as an element from without; it does not obliterate national and ethnic distinctions and peculiarities; no code has been built upon it as the sole foundation; it has rather interfered with and moulded the form of the development from ideas and principles having no reference to religion. The Roman people and the Roman law retained their distinctive character, in the midst of all the changes wrought in them by Christian teaching. The English law is eminently Christian, although it carries the ineffaceable marks of its tribal sources, and its national institutions.

§ 319. The system of jurisprudence which Christianity first met was the Roman. Of the nature of this law before the Advent, I shall speak in another chapter. It is enough now to say that the original arbitrariness had already begun to yield to the philosophical ideas borrowed from the Greeks, and that, before the effect of the new religion was felt, the law, through the labors of prætors and jurists, had advanced to a high position, and incorporated into its practical rules many of the principles of the law of nature. The *jus gentium* was fast displacing the old *lex civilis*. But even the philosophy of the Greeks, as taught by Plato or Aristotle, did not recognize many rights and duties which, derived from the revelation of the Divine Will, have become familiar to us. These principles, without doubt, have been a contribution to practical jurisprudence from Christianity.

§ 320. It must not be supposed that this effect among the Romans was immediate. The progress of the new religion was at first confined to the common people, and slowly reached the educated and influential classes. It is true, that, during the earlier ages of the Christian era, some philosophical and judicial writers, attracted by the pure morality of the teachings of Christ and his ministers, may have borrowed their precepts and incorporated them into their own works. M. Troplong, in his essay *De L'In-*

*fluence du Christianisme sur le droit civil des Romains*, is of the opinion that Seneca shows the plain effect of Christian doctrines. Even after the empire became converted, the revolution in the law was not sudden. The state adopted the religion, but the people, in their manners, customs, and habits of thought, were still pagan. The church, instead of applying herself directly to mould society and institutions, was yet engaged in discussing and fixing doctrines. An opportunity, however, was given to bring the maxims of religion home to the private affairs and business of the people. Bishops were encouraged, and even required to act as arbiters between litigant parties. In filling this office, they continually deferred to the principles of the morality which they taught as clergymen. Thus they were able to mitigate the condition of slaves, to soften the relation of parent and child, to protect minors and wards under the control of guardians or tutors, and generally to infuse a spirit of charity into the ordinary affairs and transactions of life. From the time of Constantine, except during the apostasy of Julian, many of the emperors directly interfered with the municipal law, and by their constitutions or statutes, brought portions of it into a close agreement with Christian morals. The branches which most considerably felt the influence of these ideas, were those relating to masters and slaves, to parent and child, to husband and wife, to marriage and divorce, to the forms and technical requirements of last wills and testaments, and to the succession to the estates of deceased persons.

§ 321. When the Western Roman Empire was overrun by the Teutonic nations, these conquerors soon bowed to the religion of Christ. In their primitive tribal institutions, they possessed the means of bringing the maxims of a pure morality to bear with a considerable force upon the untutored freemen. It has already been shown that the original folk courts, which were common to the Saxons in England, the Franks in Gaul, and the other invaders, were presided

over by a lay officer, a graff, a count, or an ealdorman, associated with a bishop. Beyond all doubt, during this and the ages immediately following, the ecclesiastics were the best educated and most refined class in the European communities. They were the depositaries of the learning of the times. Although the presidency of the freemen's courts did not give them the right to vote, or to decide disputes in the capacity of judges, yet the official position and sacred character and attainments of the bishops gave them an overpowering influence in controlling the action of the assembled freemen. They gave instruction in the law, explained the rights and duties of the parties, and in so doing, drew largely upon the inexhaustible fountains of justice and equity contained in the sacred writings and teachings of the church. In this manner the English law, from the first, powerfully felt the animating influence of the Christian religion. An impetus was imparted, a direction given, which have never been lost. To this primitive origin, we must refer the fact, stated by some writers, that Christianity is a part of the common law of England.

§ 322. In whatever else we may surpass our early ancestors, they certainly exceeded us in depth of devotion to religion; they recognized, acknowledged, and deferred to the overruling hand of God, with a more childlike faith. Perhaps their conceptions of true religion may have been somewhat imperfect, but they surely acted upon these conceptions in the every-day concerns of life; they did not lift their belief up out of the daily round of duties, but brought it down to their firesides, their intercourse with each other, their judicial tribunals, and their governments. It was this simple trust upon Providence alone which originated and continued the trials by ordeal, and by wager of battle. We may talk, in this day of unfaith, about the jugglery of priests, and the bloody rudeness of our ancestors, but we cannot escape the truth, that they regarded these customs as legitimate means of appeal to God to interpose and de-

cide a dispute, when the correct solution could not be reached by any evidence within their power to use. So complete was this public deference to the precepts of religion, that Alfred, king among the Saxons, preceded his code by a formal enactment of the Ten Commandments, and some portion of the legislation of Moses, and declared these to be a part of the laws of his kingdom.

§ 323. In the United States, and in the separate commonwealths, we have, in theory at least, banished all this recognition of God in our governmental and judicial institutions. Yet some remains of our long education, lasting through centuries of our English history, are still preserved to us, in the oaths administered to witnesses, and the forms of writs or judicial orders acknowledging that we exist as a free and independent people by the grace of God. I may be permitted here to express a fervent hope, that, as a people we are certainly Christian, so as a nation we may soon throw off our character of infidelity.

§ 324. The description given in this and the preceding chapters, of the law of definite enactment, and the law of judicial decision, of their respective origins, methods of development, and essential characteristics, will enable us to form a correct estimate of their comparative excellence, and adaptation to the uses of an organized society in forming its municipal law.

The two propositions which I believe to be clearly deducible from this examination are: First, That a national jurisprudence, which is the product of judicial decision, is better fitted to the wants of a free and enlightened people than one embodied entirely in statutes; and, Second, That such a form of the municipal law is absolutely inseparable from a state progressing in civilization, and will appear, notwithstanding all attempts to subvert it and substitute a legislative code in its stead.

§ 325. These two propositions do not depend upon each other; much less is one a corollary of the other. The

former can only be maintained by weighing the advantages and disadvantages inherent in the two systems; the latter rests more upon a historical basis, and upon those necessary laws which govern the development of society. Legislatures may deny the first proposition, and decide that the statute is preferable, and extend it so as to embrace all the existing rules of civil conduct at a given time, but they cannot, by any force of authority annul the fact contained in the second; it will still press upon them, and introduce an element of unwritten or common law upon their solid foundations of enactment. I will then illustrate these two principles separately.

§ 326. What are the chief excellences and demerits of the law of judicial decision, and of the law of enactment? If the former be preferable, its advantages must exceed and its faults be less than those of the other. What is required in any form of national jurisprudence that it may best accomplish its design of prescribing the methods by which the state exerts its governing action? First, that the several rules should be clear, precise and certain, so that the citizen, as far as the nature of the subject will admit, may understand them, and be instructed in his duty; Secondly, that these rules should be comprehensive, so that they may embrace not only transactions and relations already known, investigated, and in terms provided for, but all others which may naturally arise in the progress of society; Thirdly, that these rules, however stringent they may be, should not forever remain fixed and immovable, the same through all time, but should possess in themselves the inherent power of adaptation to the wants of a progressive people, being able to withdraw from the forms of the past, and fit themselves to the life of the present; Fourthly, that these rules as they exist at any given time, should be flexible, containing provision for exceptions to their general requirements, so that when a case does not fall within the reason, although it may within the letter of a regulation, it shall not be con-

trolled by it contrary to justice and equity; Fifthly, that these rules should not be arbitrary and disconnected, but should be united together by general principles into one complete system, with parts mutually dependent and sustaining. I think that it will be readily conceded that a perfect municipal law should at least possess all of these qualities, and to establish my first proposition, it must be shown that they are found in the unwritten law to a greater degree than in the statute, or that the latter is entirely deficient in some of them, although it may share others in common with its rival system.

§ 327. It is generally claimed for the law cast into the mould of statutes or general codes, that its provisions are more certain, precise, and definite than those of the law of judicial decision, and that from it, therefore, the citizen can best learn the obligations which the state has placed upon him, and prepare to perform them. The argument of the advocates of codes rests almost entirely upon this premise. While I am not prepared to admit its truth to the full extent, I must concede, that, in respect to the element of precision and certainty, the statute law has, or can have, the superiority, and were this the only attribute of a perfect jurisprudence, or did the statute possess the others in a degree equal to the law built up by judicial decision, it is plain that the best interests of all peoples would require that their entire jurisprudence should be transformed into codes.

§ 328. In some portions of a municipal law, certainty and precision are of the highest importance; all other qualities should be sacrificed to this; the separate rules should be clearly and sharply defined; no room should be left for doubt as to the duties of the citizen. Chief among these departments is that which defines crimes, and apportions their punishments. The criminal law so immediately affects the welfare of the citizen, reaching to his life and liberty, that all its provisions should be made in the highest degree simple and plain and certain. There should be no occasion

or opportunity given for judicial construction, for inference, or for progress. The state should be able to say to the criminal, The rule you have broken was fully declared to you, and fully comprehended by you, the exact punishment was threatened, and in the face of these warnings you have violated your duty, and must suffer the penalty. Therefore, both the interests of the state as a governing body, and of the people as the governed, require that the criminal law should be reduced to positive enactments by the legislature. The statute affords the best means of conveying to the people the organic will in reference to this class of subjects. Hence, in most, if not all of the American States, as well as in the legislation of the Federal Government, the criminal law has been entirely reduced to a statute form. In most of the European countries the same is true. In England the penal as well as the private law was originally a part of the unwritten jurisprudence; it had grown up in a great measure from judicial decision. But the consequences were felt to be disastrous, and of late years, much, if not most of it, has been remodelled by parliamentary action. Some portions of political law, which require certainty in preference to other qualities, are also better expressed by statutes; but, as I shall attempt to show in the sequel, this does not apply to the fundamental organic law, or constitution of a nation.

§ 329. But the claim that the statute law, even when systematized and reduced to a comprehensive national code, possesses the advantage in the certainty of its provisions, should not be admitted to the full extent claimed by its advocates. The law as decided by the courts is written, as well as that enacted by legislatures. It is possible, nay, it generally happens, that the particular rule wrought out, and definitively announced by the judges who compose the tribunal, is as precise and certain and authoritative in its terms as the one which has been contrived and published by the individuals who compose a legislature.

§ 330. The uncertainty, then, which is said to belong to the law of judicial decision, does not reside in any difficulty of understanding the meaning of its already known and settled conclusions; it consists entirely in the impossibility of *always* being able to anticipate with correctness what will be the rule deduced and applied by the courts to relations not embraced by any former decision or precedent; the same species of uncertainty which belongs to the results of every description of moral reasoning. The judges have, through the course of centuries, brought forth into the form of positive legislation, a vast number of particular maxims and regulations, all, however, as inferences, argumentatively drawn from a comparatively few general principles. These have all the attributes of certainty and precision which belong to statutes and codes. But as this unwritten or common law, in its essence, is not so much a complete, finished system, as a power, a life contained in ever-germinant principles, developing through the judicial action of courts, the judges are constantly called upon to do what the statute cannot, to bring forth new rules from the old premises, and apply them to the ever-changing circumstances of society. In this very characteristic of the law of judicial decision, which gives it so decided a superiority over the other, is involved its only uncertainty, in comparison with the rules of definite enactment. The common law then, is uncertain, simply in respect to that power which it possesses, above and beyond the statute, and the latter attains its peculiar merit of certainty at the expense of a higher and more important attribute.

§ 331. So far as the law of judicial decision has been expressed in writing, it shares with the statute the same qualities of certainty and uncertainty. Both partake of the imperfections which accompany the clothing of thought in language. Language at best often fails to convey the true idea of the speaker or writer, and as judges and legislators alike may be unskilful in the use of this instrument, so their

handiwork may easily lack the requisites of precision and clearness.

§ 332. While both systems of positive law are thus liable to fail in imparting to the citizen a complete understanding of his duties, there are some reasons why the statute may be more obnoxious to this fault than the judicial decision. As the rules established by courts are never arbitrary, but are inferences from more general propositions, or analogies drawn from kindred subjects, the interpretation of the language in which these rules have been clothed is always aided by reasons drawn from the original principles and applied to the doubtful statement. This method of the growth of the unwritten law makes it self-interpreting; the very steps which are taken to reach a decision and announce the law, afford an explanation of this conclusion. But with the statute law, or much of it at least, this advantage does not exist. Its provisions are seldom based upon any natural premises found either in institutions, or the maxims of equity; they cannot be inferred by pure reasoning; they are rather contrived from motives of expediency, and are indeed often entirely arbitrary. The interpretation of the legislative enactments can seldom, then, be aided by a resort to general principles, and in our search for the meaning, we are generally thrown back upon the mere language, which is the channel of communication for the thought. This fact has made the interpretation of statutes a matter of constant difficulty, and has given to the courts a large part of their judicial labors. Many instances might be given to illustrate this statement; but indeed they are of every-day occurrence. Hardly a statute is passed, of which the important provisions must not be discussed, construed, and settled by the judiciary. In the reign of Charles II. a statute was enacted by the English parliament, designed to diminish opportunities for fraud, by making it necessary that certain specified agreements should be reduced to writing in order to be binding upon the parties. The act is

short and apparently plain, yet thousands of decisions have been required to ascertain its meaning. In the State of New York an endeavor was made to define the crime of murder by the revised statutes, so that no question could arise as to the circumstances which would constitute it. Yet with all this attempt at a careful and exhaustive definition, the courts have been compelled to intervene, and explain the language used by the legislature. The Federal courts have been largely occupied in giving a construction to the Constitution of the United States, and will continue to do so, as long as the nation shall exist. In fact the legal history of America, of England, and of France demonstrates that judicial legislation has been constantly invoked to interpret the provisions of single statutes and general codes, and the product of this labor is incorporated with the written law, as explanatory of its terms, and thus an unwritten law invariably grows up on the foundation of the legislative enactment. I admit that when the whole national jurisprudence is collected into a general code, the difficulty of understanding the meaning of particular rules, is not so strongly felt, as when the statutes are passed singly and at intervals; for a code at all scientific is necessarily grouped about, and built upon some central principles, so that the individual provisions are, to a certain degree, reasonably inferred from these general premises; the code has more order, method, symmetry, unity of design, and completeness, so that one part serves to explain another. But yet there remains in codes, as well as in single statutes and judicial decisions, the element of uncertainty which must result from the employment of so imperfect an instrument as language to convey to the citizens the organic will of the state.

§ 333. The conclusion is, that whatever superiority statutes or codes may have over the law of judicial decision in respect to the attribute of precision and certainty, they enjoy simply because they lack a power of expansion pos-

sessed by the other, which is itself one of the essential features of a perfect national jurisprudence.

§ 334. The second requisite of a perfect municipal law is, that its rules should be comprehensive, so that they may include not only transactions and relations already known, investigated and provided for, but all others also which may naturally arise in the progress of society.

Statutes, and particularly general codes, are entirely wanting in this attribute, and it is a want of such magnitude, that among any progressive people, the courts must be called in to supply the deficiency, by a sequel of judicial legislation, engrafted upon that of the parliament. The code may be perfect as far as it goes; it may be sufficient for all the needs of society at the time it was passed; but it cannot, in its own specific rules, anticipate and provide for the thousand new demands of a people, among whom ideas are still working. With such a people, each year sees some progress; what is adapted to one generation becomes obsolete and useless for the next. The code then gradually loses its application to the circumstances of the nation, or perhaps it may retard the onward march, and thus become a hindrance, instead of a help, to a more perfect civilization.

§ 335. But the law of judicial decision enjoys this important attribute in the highest degree; indeed it is its essential characteristic, differencing it from the law of definite enactment. This form of a municipal law, naturally and inevitably, by its own inherent method of development, keeps step with the national progress; its positive rules of to-day are just such as the private and public relations of the citizens demand; to-morrow, some of these relations will have been exchanged for others, but the law will make a corresponding movement in advance, to meet this movement of society. I need not repeat the description, already given, of the method and spirit of this continuous growth. What has been said, in the preceding part of this chapter, of the characteristics of the two forms of a municipal law,

in respect to their origin and development, is enough to show that single statutes and complete codes can only be comprehensive and perfect for the stage of society in which they were called into existence as collections of positive rules, while the law of judicial decision has an inherent power of expansion, unlimited except by the national life of the people, of whose civilization it is the product and exponent.

§ 336. The third requisite of a perfect municipal law is, that its rules, however stringent they may be, should not remain forever fixed, the same through all time, but that they should have in themselves a capacity for adaptation to the varying wants of a progressive society, being able to loose their hold upon the forms of the past, and fit themselves to the life of the present.

The discussion in the former portion of this chapter has demonstrated that the statutes and codes cannot possess this function. As they were created, they must stand, no matter what revolutions the state may have experienced, until the legislature, who gave them birth, shall interpose to repeal, amend, or add to their provisions. They may indeed be changed, but not by any force residing in and forming a part of their essential being; a foreign power must be invoked, and this very necessity, as we have seen, invariably prevents the emendations and alterations from flowing naturally out from the old matters, and causes sudden breaks and displacements in the different parts. Now the development of an organic society is always continuous, sometimes indeed rapid, and sometimes slow, but the present is never entirely cut off from the past, but issues from it by natural and necessary laws. A statutory code, amended from time to time, can never exactly represent the state of the national civilization.

§ 337. On the other hand, the unwritten law, as has been shown in this chapter, by its very process of becoming law, is continually rejecting what has been outgrown, and

stating new rules to apply to the relations which are constantly arising. It pushes out its advances in every direction; if the enterprise of any portion of the citizens has opened new channels of trade and business, it anticipates the legislature, and is immediately at hand to define and establish the new rights and duties which may spring from the untried field of activity. It cannot be denied that this power of the law of judicial decision is one of great importance, and that it gives the system a decided superiority over the other, as a practical instrument for adjusting the private relations of the people of a state.

§ 338. The fourth requisite of a perfect municipal law, is, that its rules as they exist at any given time, should be flexible, and should embrace the power of admitting exceptions to their general requirements, so that when a case does not fall within the reason, although it may within the letter of a regulation, it shall not be controlled by it, contrary to right and equity.

Every national jurisprudence should aim at promoting justice; the nearer it approaches to the teachings of conscience and the morality of Christianity, the nearer it is to an ideal legislation. The contrast between the statutory code, and the free law of judicial decision in this faculty of doing right by adaptation to different circumstances, is striking, and exhibits in a clear light the superiority of the latter system. The one is rigid and inflexible in its rules; they may be repealed by legislatures, but while they last, they admit of no exceptions. The very nature of a statute, as the expression of the supreme will of the state, allows of no interference with its provisions by the courts, or other departments of the government. It may require judicial construction to arrive at the meaning of particular enactments, but this once ascertained, they must be implicitly followed. Were the judges permitted to bend the statutory rules to meet the exigencies of individual cases, and thus promote substantial justice, their essential character would be

lost; they would become part and parcel of the unwritten law.

§ 339. The law of judicial decision, on the contrary, is, from the very nature of its creation and development, flexible and free. Not enacted in bulk, but built up by gradual accretions, as single cases arise to call out its expressions, the circumstances of these cases enter largely as a controlling element, in determining what the new statement of positive rules shall be. We have already seen how, in the progress from rude beginnings toward scientific amplitude, the principles of equity have constantly entered more and more into it, and have been felt in producing beneficial results upon the general prosperity of the people.

§ 340. An instance will serve to illustrate the workings of the two systems. The legislatures of England and most of the American States have passed statutes prescribing certain formalities as necessary to the proper execution and authentication of last wills and testaments. The design was to prevent fraudulent and perjured claims, set up by false and forged wills, and so far was good. The provisions of these statutes are somewhat different; that of one State ordains that the will shall be signed by the testator, and be acknowledged to be his last will in the presence of two witnesses, who shall in his presence affix their names to the instrument. A case might arise, and indeed has arisen, where the will was made, signed, and witnessed, but the testator by oversight or carelessness or ignorance, acknowledged it to be his *act or deed*, instead of last will. Here the intention of the deceased was evident: he endeavored to fulfil the requirements of the statute, and the plainest equity urges that the disposition of his property should be carried out. The law of judicial decision, untrammelled by legislative authority, would have regarded this intention, and pronounced the will valid, but the statute having once marked out the course to be pursued, can suffer no devia-

tion, and declares that the testator has failed in his attempt to transmit his property according to his wishes.

§ 341. This essential distinction between the statute and the unwritten law, can never be removed without merging the one in the other. If a code should declare that its special rules were to be construed according to equity, that they were to yield to the requirements of justice, and should leave to the courts the power of determining the occasions when the general principles of right should override the particular provisions of the statute, its peculiar character would be gone; in the hands of the judges it would be simply a systematic declaration of the ascertained results of judicial decision.

§ 342. The final requisite of a perfect municipal law which I have given, is, that its rules should not be arbitrary and disconnected, but should be united together by general principles into one complete system, with parts mutually dependent and supporting.

I have already shown that this attribute is found in a high degree in the law of judicial decision, and that it does not exist in separate and fragmentary statutes, such as are common in England and most of the United States. But when the national jurisprudence is embodied in a general code, it can share with the unwritten law the merit of dependence upon general principles, and of unity and homogeneity; its departments may be related to each other, and a common spirit may pervade it. Indeed, so far as the outward formal expression of legal rules affects the character of a system, a general code enjoys advantages over the unwritten law, in the classification and arrangement of its subjects, and the symmetry of the whole plan.

§ 343. From this comparison, I think it sufficiently appears, that a national jurisprudence, which is the product of judicial decision, is better fitted to the wants of a free, enlightened, and progressive people, than one consisting entirely of statutes.

§ 344. The second proposition which I maintain is, that a municipal law, in whole or in part the product of judicial decision, gradually constructed and developed by courts, is absolutely inseparable from a state progressing in civilization, and will appear, notwithstanding all attempts to subvert it, and substitute a legislative code in its stead. The truth of this statement will appear probable from much of the preceding discussion. A nation full of vitality, prosperous, expanding, with vigorous race forces animating the people, will not remain content with an inferior form of legislation. As the law touches so closely each man's private relations, and in its broadest view, so plainly expresses the national civilization, it must assume such a form, that it may accompany and aid the march of that civilization. If, then, it be true, that codes cannot do more than embody the ideas of the age in which they were created, and have not the capacity to yield to the irresistible pressure of the national force, and accommodate themselves to the people's growth, that force and growth must break over the barrier, and extend themselves beyond the restricted limits of the statute; they must find a way of making themselves felt through the courts; they must create new law by the judiciary. These are necessary consequences of national progress. History corroborates this antecedent theory, and shows that such has been the course of legislation in all states where free ideas have had outward expression among the whole, or any large portion of the citizens.

§ 345. At the commencement of the development, when the nation has just awoke to the conception of a separate organic existence, and seems to be pausing before it takes up its onward march, codes have been common. Before their appearance, the law, if such it may be called, consisted in a few tribal and neighborhood customs, which, however, were the seeds of a vast future growth. These are finally found to be too meagre and weak for the national wants, and are collected into a precise statutory form, the

basis of which are the old familiar rules, which have served thus far to govern society, with such additions and improvements as could be invented, or borrowed from the legislation of other states. Thus the Roman jurisprudence took its initiative with the code of the XII. Tables, compiled from the preëxisting customary law. The Franks immediately before, or shortly after their successful invasions of Gaul, promulgated the codes known as the Salic and the Ripuarian laws. Aethilbirht, king of the Kentish people, about the year 600, published the oldest collection of laws among the Anglo-Saxons, which was followed by many other from the kings of the Saxon and the Danish dynasties. The general character of all these compilations was the same. They were meagre, and left much to be supplied by the customary laws of the people. The Roman XII. Tables appear to have embraced the greatest number of important topics, including, among others, rules relating to husband and wife, parent and child, to property and many of the contracts respecting it, to inheritances, to the rites of religion, to judicial proceedings, and to the political institutions of the state. The Saxon and Frankish codes were chiefly occupied with the allotment of specific punishments to different acts of violence upon persons and property.

§ 346. When, leaving this starting point, we follow along the course of legal and national history, we find the same facts appearing in the Roman republic and empire and in England, and, though perhaps to a degree less marked, in the continental states of Europe. I have already sketched the process of development of legal ideas, forms, maxims, and rules, through the action of the Roman prætors and jurists, and of the English courts, and it is unnecessary again to recur to the subject. We have seen that as the state advanced in civilization and material resources, the same wants were felt by these peoples so widely different in the character of their national life; that the rude primitive codes were outgrown; that the people demanded a legis-

lation commensurate with their activity, and that this demand was naturally responded to by the courts. A controlling reason why this course of events in the life of a nation is more apparent in the Roman republic and empire and in England, than in the continental states of modern Europe, may be found in the fact, that in these two countries more than in any others, have the judicial departments been kept separate and independent of the executive and legislative, whether these latter were senate or parliament, king or emperor. In France, after the rise of the kingly power upon the overthrow of the feudal princes, the crown became not only the theoretical but the actual source of the municipal law which depended upon direct legislation. But there was also a common law, built up and expounded by the courts, which were scattered through the departments into which the kingdom was divided. These courts, however, were independent of each other, and, in the process of time, each became the centre of its own local law, so that at the time of the Revolution there were two hundred and fifty separate systems of jurisprudence prevailing through France. This result, so disastrous to the prosperity of the people, and destructive of all unity and scientific completeness of the municipal law, was not the natural consequence of the creative function possessed by the judges, but of the peculiar institutions of France, which provided no head, controlling the subordinate tribunals, and bringing their decisions into agreement with each other.

§ 347. In Rome, the judicial development of a free, expansive, common law, continued through the republic, reached its culminating point during the earlier portion of the empire, began to decline with the receding civilization, and finally ceased, when the progress of civilization having stopped, the true Roman life having become dead, there no longer existed any need for the constant reproduction. Henceforth, all legislation was statutory. In such a condition of the nation, a collection of the principles, maxims,

and rules of law, which lay scattered along the centuries marking the line of the glorious progress, into one convenient and comprehensive code, was in the highest degree necessary. Although partial compilations had been made before, Justinian accomplished the work, and thereafter the dead Roman people created no more law; what has since been added upon this basis, has been the product of other living nations, who, succeeding to the empire, have inherited the labors of their predecessors.

§ 348. In the history of the Roman commonwealth, we have an example of the complete life and natural and necessary progress of a national jurisprudence, from its birth to its death. In England and its transplanted stock in America, we can discern the same progress, but as yet full of life, vigor, and growth. But attempts have been made in modern times, in countries teeming with activity, to reverse this apparent law of historical development, and give a permanent code to the people, which should contain all the legislation needed for the private relations of the citizens. The French codes, promulgated by Napoleon I., as described in Chapter First, of this Part, were the first, and continue to be the most prominent, example of this endeavor.

§ 349. Now it is to be remarked that none of these codes are original in their principles or details. Like those of Justinian, they were compiled and digested from former municipal regulations which had grown up in the state itself, or had been adopted from other countries, from principles worked out through a progressive state of jurisprudence. Indeed, it is impossible, in the natural course of legislation, without the force exerted by a conquering nation upon the conquered, to originate and invent a code entirely new, and impose it upon a people. No such thing has ever been done. A jurisprudence must be the product of the ideas and life of the people over which it dominates; it must spring from the soil. Even a conquering nation can only establish their own laws over their subjects, by extir-

pating all the elements of a separate national existence. Foreign regulations and institutions, however admirable they may be in themselves, cannot be imported and successfully incorporated into the native law, unless they will assimilate with the habits of thought of the people, with those ideas, which, derived from the primitive stock, seem to be a part of their very being. Thus the French system of the marriage relation, with its divided interests, its virtual partnership, its contribution of property by husband and wife to the common stock, its careful distinction between the separate ownership, could never flourish on English soil, where for centuries the husband and wife have been merged into one, and the indivisible unity of the family has been most carefully guarded. The inconsiderate attempts recently made in some American States to engraft this French idea upon our English stock, have not been accepted by the people. The statutes have, of course, given a rule to the courts, but the people have gone on, and will continue to live and act in accordance with the ideas which they have inherited from their race.

§ 350. The codes of France are made up in part of the ancient law of that kingdom, but so far as they relate to private rights, are principally founded upon the jurisprudence of Rome, which had long been the substratum of the legislation of European countries. This jurisprudence has indeed been recast into a modern form, more suited to the manners and life of the present age. The same is true of the civil code of Louisiana.

§ 351. But have the codes of France and of Louisiana dispensed with the necessity of a judiciary, possessing the faculty to create and add new law, as the needs of a progressive society demand? By no means. The necessary laws of national progress could not be confined by the severe restraints of legislative enactment. These general codes, comprehensive and admirable, as expressive of law already known, have only been what the English and

American law of judicial decision would be, were it, so far as developed, to be crystallized into a concise systematic form of short and definite rules. Were this to be done, the past would remain fixed, but a power would yet exist in the courts to go on adding new material to this foundation. It has been found necessary in France and Louisiana, that the judiciary should take up the legislative function where the legislature has dropped it; and so it must continue, until these states shall sink into a condition resembling that of the decline of the Roman empire.

§ 352. I had intended to close this chapter with a careful comparison between a fixed written national constitution, like that of the United States, and one free, elastic, unwritten, and traditional, like that of Great Britain, but my limits forbid anything more than a general reference to the subject. I believe, however, that the panegyrics which we have been in the habit of bestowing upon our organic law, because it is embodied in precise statutory forms, are founded in a vital error. I believe that the principles of legislation already set forth in this chapter, as necessary to a vigorous, progressive state, apply with equal force, to the law which governs the private relations of citizens, and that which determines the acts of the government itself. In fact, as the interests committed to the state in its organic capacity, are of far higher consequence than those controlled by the private law, it is even more important that the constitution should be framed in accordance with the universal experience of mankind, and the true theory of legislation. The contrary principle, of confining the government by a rigid system of unalterable rules, has been carried by us to an extreme, which is producing its natural reaction in the frequent changes made in state constitutions. In some of the American commonwealths the organic law resembles, in minuteness of detail, rather a codification of statutes, than a statement of the grand leading maxims and institu-

tions which underlie and support the whole mass of jurisprudence, and the whole activity of the state.

§ 353. The effect of this form of constitution may be felt in those sudden crises which overtake a nation and shake it to the centre, and in the peaceful progress of the people, developing from generation to generation in resources and culture. The United States is now suffering most disastrously the inevitable consequences of an organic law, rigid and inflexible in its provisions, without power of adaptation to a radical change of circumstances. Formed for a condition of internal peace, and ignoring the possibility of a civil war, its unyielding rules are paralysing and repressing the national energies. Every attempt to cope with the unforeseen emergency by extraordinary measures is met by some iron barrier. The congress and the executive representing the body politic, are indeed not so effectually resisted by the open armed enemies of the country, as by the very form of the organic law, which now appears as though contrived to destroy the force of a people laboring to maintain their existence. Indeed, it is evident that the disunion itself is the inevitable result of this constitution, framed for one generation, and so quickly outgrown by the progress of ideas in another.

§ 354. But, independent of this extraordinary crisis, our history, short as it is, shows that it has been necessary for the government gradually to depart from the written constitution, as it was understood and interpreted at the time of its adoption. Judicial construction has added new matter to its concise provisions, and, as in the case of any code, a law of judicial decision has grown up, which furnishes the practical rules which guide the government. This work of legislation will continue as long as the nation exists, until the written constitution shall have virtually disappeared in the accumulation of unwritten exposition, as the Roman code of the XII. Tables, in the time of Cicero, had sunk into neglect, amidst the growth of the praetorian jurisprudence.

§ 355. The conclusion to which I arrive from the discussions of this chapter is, that while a nation is in a state of advance, a free system of law, the product of courts is absolutely necessary; that when codes have been adopted in such countries, they are not final, the courts must proceed to build upon them. When codes alone have served all the purposes of a national legislation, the national life has become effete.

# PART II.

## NATIONAL SOURCES OF ENGLISH AND AMERICAN LAW.

## CHAPTER I.

### THE ANGLO-SAXON LAWS AND INSTITUTIONS.

§ 356. In the preceding chapters many allusions have been made to the tribal customs of the Teutonic nations which settled down upon western Europe, and in them we have found the germs of some of our most important institutions. I purpose in the present chapter to give a short and general outline of the Anglo-Saxon laws, as they may be collected from the careful and exhaustive investigations of modern writers. It cannot be denied that much uncertainty exists in regard to this subject; that different authors of great credit, have arrived at opposite conclusions, not only in regard to the subordinate and minuter details of the Saxon social organization, but even in respect to the great institutions which underlay it.

§ 357. It must not be supposed that we shall find any resemblance between the actual legislation of the Saxons, and our own private laws. They have given to us potentialities, the seeds, rather than the fruits, or even a growth begun. They have bequeathed to us a strong and vigorous race life, pervading the mass of sturdy and sensible middling classes; the instincts of personal freedom; the confident

self-reliance; the disposition to self-government. We shall find these tendencies, which characterize the English and Americans of the present day, evidently at work at the very foundation of the Anglo-Saxon polity. The meagre development of these principles among our early ancestors, was suited to the age in which they lived; their form with us has been modified by the complete change in outward circumstances, but the essential ideas are still the same.

§ 358. When the Romans extended their conquests into Gaul and Britain, they met with nations of fierce barbarians, having a general resemblance in manners, customs, and languages. These different tribes, evidently sprung from the same stock, belonging to the same ethnic family, have been known as the Celtic people. This race was the first of those great waves of population which have swept over Europe from the high table lands of central Asia, and broken upon the shores of the Atlantic. Of their customs it would be useless to enquire, for they have left no sensible impress upon the civilization of Europe. Although a few writers, generally, as I believe, of Celtic descent, have attributed much of the advance of modern times to the influence of this people, yet it does not seem, from a careful survey of European history, that, as a race, they possessed any capacity for an enlarged civilization. They are exceedingly tenacious of their tribal peculiarities, as may be witnessed among the Welsh and Irish, but as a people, they yielded to the superior power in arms of the Romans and Teutons; and had not that unconquerable native force which would enable them to rise through and above their invaders, pushing up their own institutions side by side with those imposed upon them. In Gaul and Britain, at first subjugated by the Romans, they became the lowest stratum of society, under the fierce domination of the Germans.

§ 359. Britain, thus peopled by Celts, was invaded by the Romans under Julius Cæsar. After a long series of contests, the subjugation was completed by Agricola. The

Roman civilization was introduced; towns were built up and organized upon the Roman plan; the Roman laws were introduced and administered by Roman tribunals, and the armies of the empire were scattered throughout the country. This domination continued until the western empire was sinking under the attacks of the Germans, and finally, about the year 410 A. D., the legions were withdrawn, and the island was abandoned to its original possessors.

For reasons already noticed, and given more fully in a subsequent chapter, it is not probable that this long rule of the Romans has produced any substantial result upon the subsequent civilization and laws of the English people. The change effected by the Anglo-Saxons in Britain was much more radical and complete, than that wrought by the other Germanic nations in Gaul and Italy.

§ 360. During a considerable period after the departure of the Romans, the native Celtic tribes were left in the possession, though not peaceable, of their country. Fierce, internecine wars immediately sprung up among them, which undoubtedly must have obliterated much of the effects of the Roman residence, and which, according to most writers, resulted in the introduction of the Saxons to assist one of the contending parties, and their conquest of the southern portion of the island.

§ 361. Even at the time when Julius Cæsar was leading his victorious legions against the Celts in Gaul and Britain, another race of people, who had followed the footsteps of the first migration from Asia, and who were destined afterward to act a most important part in the history of the world, and to enjoy with the Latins the office of impressing themselves upon the civilization of all subsequent times, had already pressed up to the east bank of the Rhine. These were the German or Teutonic tribes. For a long time they were successfully resisted by the superior prowess of the empire, but as this began to wane, and was given up to

luxury, the fierce barbarians broke in upon it in numerous and terrible invasions, until at length, in the fifth century, Gaul, Spain, and even Italy were swept over and subdued by these hordes, and the western empire was ended. About the year 415, the Visigoths penetrated Spain. Shortly after the Burgundians invaded Gaul, and were succeeded by the Franks, who established themselves firmly upon the ruins of the old provincial rule. Rome itself was captured in the year 476 by the barbarians under Odoacer, who was in turn driven out by the Ostrogoths in 493. About a century after, the Lombards founded a kingdom in the north of Italy.

§ 362. The Saxons and the Angles were two of this family of tribes, who had settled down on the shores of the German Ocean and of the Baltic. In the year 449, with small numbers, they began the invasion of Britain, and continued their successive inroads, until, by the year 560, the great mass of the Saxons and Angles had been transferred from the continent; the Celts had been driven into Wales and Ireland, or had been reduced to a state of subjugation; and Britain was in possession of and dominated over by numerous small, independent, and often hostile peoples, who all belonged to the Teutonic family of races. Histories generally give a detailed account of the circumstances under which this first invasion took place, and describe it as characterized by much faith on the part of the Britons, and treachery on the part of the Saxons; but Kemble, in the first chapter of his "Saxons in England," has done much to shake all confidence in these traditions, and they are probably like the myths embodied by Livy in his history of the early Romans. It is generally stated in histories that originally the English country was divided into seven or eight distinct kingdoms, but Sir Francis Palgrave, Mr. Kemble, and Mr. Allen, have all shown that in the earlier years of their rule, this division was much more minute, and that these eight kingdoms which formed the octarchy were in

fact only loose aggregations of independent tribes, each with its own military head or chieftain. Still these larger kingdoms afterward became more clearly defined. They were often hostile, and the more powerful ones absorbed the weaker, until, in the year 827, the whole Saxon people were brought under the headship of King Egbert. The Anglo-Saxon supremacy, with frequent interruptions, and even temporary suspension by the Northmen, continued until its final overthrow by the Normans under William the Conqueror in the year 1066.

§ 363. I now propose to give a sketch of the customs, laws, and institutions of this people, who ruled over England for so long a time at the commencement of the present civilization, and who have transmitted their blood, their race life, much of their language, and some of their institutions to the present times.

§ 364. It must not be supposed that during this long establishment of the dominant people in England, the Saxons had remained stationary; that the laws of the age which closed their career, were entirely the same as those which they brought from their native shores. On the contrary, a great change had been effected in the people, and in their legislation. They overran Britain as a collection of wild, barbarous, pagan tribes; they became a nation, not indeed firmly knit together by the idea of an empire one and indivisible, but possessing one head, one general assembly of notables, common hopes and interests. They had attained to a considerable refinement in manners, though still inferior in this respect to the Normans; the Christian religion had mitigated much of the original tribal fierceness; intercourse with France had become common. There was then a marked though gradual progress from the rude customs of the first invaders, to the more settled policy of Alfred, of Edward, and of Harold. The same general institutions are retained, the same ideas form the basis of social order and of legislation, but the detail is considerably altered. In

describing these ideas, institutions, and legislation, I shall separate the subject into three divisions.

I. That which relates to persons; their class divisions; their rights and duties.

II. That which relates to property; and,

III. That which relates to the political organization; the government; the means of administering justice and of affording protection to life and property.

### I. OF PERSONS.

§ 365. Among all the Teutonic nations which spread over western Europe, and which, having a common race origin, should naturally possess some common ethnic institutions underlying their policy, we find two fundamental principles, as the basis of the whole superstructure of society. These are, 1st, the possession of lands, and 2d, the distinctions of rank. Our earliest knowledge of the Anglo-Saxons exhibits them at a time when their original customs were retained in their integrity, as possessing both of these essential features.

§ 366. The great class distinction, running through the whole social organization, was that which separated the people into the free and the unfree. With this was connected and interwoven the principle of landed possession, for at first the unfree could hold no lands as their own property, and he who was possessed as owner of no lands, was not wholly free. This use of the term free, must not be confounded with its general acceptation at the present day, as opposed merely to the condition of slavery. It refers simply to the status of the person, and the amount of privileges he could legally enjoy as an essential element of the state. Some of the unfree were to all intents slaves, serfs of the most abject description; others were rich, noble, possessing immunities which they gladly purchased by the loss of the somewhat barren rights of freemen. But this latter class belongs more to the later development of the Saxon polity,

than to its condition when first clearly made known in history.

§ 367. The general class of the free enjoyed certain important privileges, which distinguished them from all others, and which they had inherited as a part of their race and tribal life. They were, however, by no means all equals. Equality and freedom, with the Saxons and other Teutonic nations, were not convertible terms. Freemen were then subdivided into two generic classes, the noble, and those not noble, or, in their own language, the "Eorl," and the "Ceorl."

§ 368. The rights of the freeman, as contrasted with the unfree were, that he had the power and legal capacity to protect himself, whether he be "Eorl," or "Ceorl;" while the unfree, whether serf or of gentle birth, must be in a state of dependence or vassalage upon some other persons, must be in another's "mund." This general distinction, which drew a broad line of demarcation between these classes, exhibited itself in numerous details of privileges which belonged to the favored freemen. They could hold lands in their own right, in the communities of which they formed a part, and these possessions were termed their "alods," or inheritances, whence is derived the term allodial, subsequently introduced by legal writers to describe lands held by one in his own complete right, without any element of dependence upon a superior lord. And this ownership of lands was necessary to the full enjoyment of the rights belonging to the class. The freeman, thus in the possession of a share of the soil, could unite with his fellows in all matters concerning the general interests and welfare of the community. One of the most important of this branch of rights, was the ability to attend the local folk courts, and join in their deliberations and the decision as one of the primitive judges of law and facts, of the controversies brought before them. In these assemblies, not only judicial business, but all that affected the interests of the

local communities which they represented, were transacted. The freemen had also the right to leave their residence, to abandon the community to which they belonged, and depart to another. They could also bear arms, and wage private warfare, called the feud, against those persons or families who had injured them, and thus make reprisals for acts of violence. The land held by the freemen was also burdened by fewer restrictions than that in the possession of the unfree. Their measure or value in the eye of the law and of the community was their "wehrgyld," or price of a man, which will be more fully explained in the sequel.

§ 369. Thus it is evident that all of these special privileges of the freeman unite in the broader distinction, that he could govern himself. He entered into and took a most active part in all the administrative affairs of the local community of which he was a member. He was a living unit in the state. To such an extent was this right carried, that it included even the power to abdicate the status of freeman, to resign all of its distinctive privileges, and attach himself to some lord or patron as a superior, under whose control he entered, in whose dependence he placed himself, and thus passed into the class of the unfree.

§ 370. These essential characteristics belonged to the noble, and to the not noble, to the "Eorl," and to the "Ceorl," for both were to the full extent freemen. Yet the Eorl possessed important advantages. His "wehrgyld," or price, was higher than that of the other. In fact, the Eorl was also designated as "Twelfhaendman," while to the Ceorl was given the appellation of "Twihaendman," which would place their comparative worth, in the estimation of the Saxon law, in the ratio of 12 to 2, or 6 to 1. This preponderance of value in the eorl over the ceorl shows itself in a variety of ways, but always one noble is considered as equal to six simple freemen. Thus, in judicial disputes, when it became necessary to resort to the oaths of compurgators, as has been previously described, that of one eorl was equivalent in

effect to those of six ceorls. In private warfare or feuds, the life of one eorl, which had been taken by a ceorl, could only be avenged by the death of six ceorls, of the clan or kindred of the offender. When acts of violence were repaid by fines of money or property, which, as we shall presently see, was a common practice, the wehrgyld, or compensation, paid for the life of a noble was six times as great as that exacted for the life of the simple freeman. The nobles were also richer; they could hold larger landed possessions. But their most important advantage was of a political nature. From among this class alone could the chief judges, the ealdormen, and the kings be chosen.

§ 371. In a society so constituted, the tendency of these two classes was continually to separate. As the state gradually progressed, the power lodged in the hands of the nobles would steadily increase, and the privileges originally belonging to the simple freemen would as constantly diminish.

§ 372. The social organization thus portrayed was that of the Saxons in their primitive condition. We see that a strong and sturdy element of self-dependence characterized it. Yet there is contained in it the germ of a future development of class status, very different from that of the self-reliant "Ceorl" and "Eorl." This is found in the possibility of a third division of persons, unfree in the primitive acceptation of the term, and yet not slaves or serfs; free or noble born, perhaps, or created noble, who voluntarily assumed a condition of dependence upon some superior lord or patron. This feature, which existed as a germ among the primitive tribal customs of the Teutonic nations, finally expanded into the feudal system.

§ 373. Side by side with this old order of nobles by birth, with their privileges as a superior order of freemen, grew up another class, who were nobles by service. One of the most important powers of the Saxon king, either in the primitive times, when the people were broken up into

numerous independent tribes, each with its own chieftain, or later, when these had coalesced into a few larger communities, or later still, when the whole were consolidated into one kingdom, was that of collecting about himself and supporting a body of retainers. This comitatus or company was of the greatest service to the king, who had no army, and no means of raising one except by calling out a levy of the freemen entitled to bear arms. Upon it, therefore, he leaned more and more for the accomplishment of his designs, and as the need became greater, the rewards proportionably increased, and thus there grew up a strong personal tie between the chief and his immediate followers. At first this institution was entirely military in its character, but with the increase of the royal power, it embraced also the civil administration of the realm, and the general status of the nobles. In time it resulted in the downfall of the ancient nobles by birth, and the establishment of a new order, depending for their privileges directly upon the king, looking to him as the fountain of honor and power, and yielding to him those duties which the primitive organization of society demanded for the community. This retainer, or comes, was originally only a servant, a dependent upon the king, but might be made noble by the direct interposition of the royal favor, and would naturally share the advantages flowing from this source. Entering into the service of the king, passing under his protection, the comes was not originally free, but although he lost the privileges of freeman, he was more than repaid by the honor of the king. As rewards for his services, rendered in wars, or in personal attendance, or in support against rivals, or in the administration of the royal power, he received grants of land from out of the king's private possessions, or from the public lands annexed to the crown as the representative of the whole nation; but these gifts of land he did not hold as his alod, his own absolute property, but simply as an honorable tenant of the monarch, and bound therefor to render him

such services as were stipulated for in the charter or instrument by which the gift was conveyed. As he did not own his lands in his own right, and therefore could not, by the primitive constitution, in virtue of this property, enter into the community of the free nobles, so his own tenants did not form a part of the communities of free ceorls, but stood to him in the same relation which he bore to the king; and this consisted of fealty and dependence on the one side, and of protection and favor on the other. The proper name of the comes was "gesith;" afterward he was called "thegn." As he was not necessarily a noble by birth, it resulted, after the complete establishment of the order, that a ceorl might be raised to the dignity of thegn by the performance of certain conditions, one of which was the possession of a stipulated amount of property.

The privileges of this class became great. As the power of the king increased, and the distribution of rewards in the shape of lands and honors and offices came principally into his hands, they were chiefly meted out among these favored dependants, to the exclusion of the ancient free nobles by birth. Thus the latter continually sunk in importance and consideration in the state, until they were completely absorbed in the ranks of nobles by service.

§ 374. In the later periods of Anglo-Saxon history, we have then the original "ceorl" left existing, though much depressed from his primitive state of freedom, by passing into the condition of vassalage to the nobles; and the nobles by service or "thegns," bound to the king by the obligation of fealty, possessing large estates in lands, and often themselves surrounded by bands of inferior retainers. The two classes had become widely separated; the one had increased in power; the other had sunk in the social scale. In this we certainly have the commencement of the feudal system.

§ 375. The other class of the unfree, the "Theows," were serfs or absolute slaves. They were either reduced to this condition as the punishment for crimes, or by being

taken prisoners in war, or they were born so from parents already serfs. It is probable that a large part of these slaves were ancient Britons and their descendants. The theow was a mere chattel; he had no rights; could be transferred from one owner to another; had none of the privileges of freemen; was not, in fact, an element of the community or state. His situation was deplorable; but the church was continually and successfully struggling to mitigate it.

### II. OF PROPERTY.

§ 376. 1. *Of Personal Property.*—Among the Anglo-Saxons, as with all partially civilized nations, unless the nomadic, personal property enjoyed but little consideration in comparison with lands, and its use and transfer were fettered by regulations, necessary in a society addicted to violence, but which would be insupportable in a more developed condition of national resources, when this species of property had increased in value and amount. The personal wealth of the Saxons consisted almost entirely in cattle, and the laws against theft were framed with an especial reference to their protection. Possession gave a prima facie title or right of ownership to the possessor. This simple possession might be confirmed, and the absolute title established in two ways. The first was by proving that the animal had been his from its birth, which fact rested upon his own oath, supported by that of a compurgator. The second method was by showing a valid purchase, and calling in the seller to warrant the title, or, in other words, to prove that his own original possession was legal.

§ 377. The laws of the Saxons respecting sales were severe and ill suited to a social state like our own, but were fitted, among a rude community, to repress thefts and fraudulent practices. In order that a sale should be legal, and pass a title in the property to the purchaser, it must have been made in an open public market (market overt), in the presence of trustworthy witnesses. Many modifications

were made from time to time in this rule, by the codes promulgated by different kings, and finally a class of special officers was appointed in each local community, before whom all sales must be made; but the principle remained unaffected for a considerable time after the Norman conquest, and slight traces of it are to be found in the legislation of England at the present day. Some analogy may be traced between this rule of the Saxon law, and that of the early Romans, which rendered a transfer of certain kinds of property entirely nugatory, no matter how full and fair a price had been paid, unless certain arbitrary public forms had been strictly followed.

§ 378. 2. *Of Lands.*—As an introduction to the rules of ownership and transfer of lands, it will be useful to give a sketch of the method of settlement and inhabitancy of the cultivated portions of the soil.

The primitive feature of Saxon settlement upon land, and aggregation into society, was the "Mark;" and this is also found in other Teutonic nations, and the name is preserved in the word "marches," still in use on the continent. The mark seems to have disappeared in England, even before the end of the Saxon dynasty. The meaning of the word is something marked out, with settled and definite boundaries. It was the plot of land upon which a greater or less number of free persons with their families and dependents, as a single, separate, undivided community, settled down for purposes of cultivation and dwelling, and included all varieties of soil. Thus the mark represented the entire tract, chosen for some advantages of situation, a cultivated opening in the midst of the primeval forests. The ancient Saxon did not, like our own hardy backwoodsman, isolate himself from his fellows and make his solitary clearing in the unbroken wilds; he was one of an association bound together by common interests, and probably by ties of kin or clanship.

§ 379. The term was also applied to the boundary or en-

velope of forests which surrounded the settled and improved territory, and formed the barrier or line of separation between it and the other neighboring marks. This, for a certain distance at least, was the common property of the inhabitants or marksmen, and was regarded by them with much superstitious veneration. Here in pagan times dwelt the spiritual beings; here were the sacred groves for the worship of the deities. As the community grew by additions from new comers, and from the natural increase of the people, the bounds of the cultivated soil gradually extended, and encroached upon the forests, which were felled, and the land appropriated to the uses of husbandry. This new addition to the arable and pasturage was the common property of the whole association of marksmen; it formed a portion of the folk-land. These marks were scattered over the whole extent of the country, and in addition to the towns already in existence at the time of the invasion, were the centres of population.

§ 380. The district thus occupied by a single community was divided up for the use of the settlers. A portion of it, consisting of arable, of pasture, of marsh, and of forest, was left common. A large part of the arable, however, was separated into distinct lots, so that each free inhabitant could possess at least one, as the owner in his own right. Those who had no such share were the unfree; they were not an element of the community itself; they could not represent themselves in the folk-courts; they were in the "mund" or hand or dependence of another. Each share thus owned by a single proprietor, was called by the Anglo-Saxons a hide. A hide was then the estate of one household, the amount sufficient for the support of one family. The allotment owned by each individual free marksman was, in the strict meaning of the term, his "alod," or inheritance.

§ 381. This was the primitive condition of the Anglo-Saxon settlements, while the rights and privileges of the free were preserved and guarded, before the practice became

prevalent of creating nobles by the king, and rewarding them for their services by grants of land, to be held by the tie of fealty. These lands of course could not form a portion of the mark, nor could the tenants who lived upon and cultivated them be numbered among the free marksmen, because they did not hold their possessions in their own absolute right, but simply as the vassals of a superior lord. As the change continued to extend in the Anglo-Saxon society, and the ancient nobility by birth were absorbed into the number of nobles by service, and their estates were held by the feudal tie, and the inferior cultivators of the soil passed into the condition of vassalage, the marks, with their simple constitution, their assemblage of freemen, and their small properties, would seem to have gradually disappeared, and to have been replaced by the form resulting from this revolution in the social organization.

§ 382. Now we find a lord, or king's thegn, a convent, monastery or abbey, enjoying the sovereignty of a large territory, residing or situated upon a portion of it, and actually occupying so much as was necessary for the convenience of the noble proprietor, or of the religious house. The rest is occupied by the tenants who are grouped about this centre, forming a distinct community, of which the thegn, or the sacred corporation, is the head. A part of this territory had been formerly granted out to certain of these tenants, by written charters or deeds, and was held by them as their individual possessions, under such restrictions, and with such services, as the provisions of the charter might impose. Other portions were held by the tenants, not by any definite grants from the lord, but by customary or folk-right. Still a third division was left in common for the use of the lord, and of the entire community. This tract of land and this aggregation of tenants or vassals, surrounding the residence of a superior lord, and bound to him by the ties of fealty, holding their possessions from him by services performed for him, was termed in the subsequent period,

under the Normans, a "manor," and it represents the element of the feudal social organization.

§ 383. As well in the primitive as in the latter periods of the Anglo-Saxon occupancy of England, a portion of the territory was termed "Folk-land." This was such as had not been parceled out into alods, or granted to individual owners. It belonged to the state, and was the common property of the people or folk, and in later times, when the nation had been united into one kingdom, was under the control of the king and his great council. The final ownership being in the state, the use and possession of particular portions could be, and often were transferred to individual tenants, to be held by them in such manner and by such services as the charters or deeds might prescribe. Thus it was that the king's nobles, those who formed his comitatus and were bound to him by fealty, secured the reward of their attachment and devotion. That part of the soil which had actually been granted by charter or solemn writing, and had become the property of the possessor, was termed Boc-land.

§ 384. Of the rules of inheritance to lands, of the descents to heirs after the death of the owner, little is known except that the estate passed to the children of the deceased, if any were living, but whether to the males alone, or to the males and females alike, cannot be determined. Wills were also in use. But the disposition of boc-land, or lands which had been granted by charter or written instrument, after the death of an owner, of course depended upon the provisions of the charter which was the foundation of the rights of proprietorship. If this conveyed an absolute full title, unfettered by any restrictions, the power of the owner was complete; he might sell or devise by will at his pleasure; after his death without a will, the estate would descend directly to his heirs. But these charters often imposed restraints upon this unlimited ownership; they might give an estate during the time of a single life only, when the land

would revert back to the original proprietor upon the death of the tenant; or they might point out the class of persons to whom it should pass upon the decease of the immediate possessor, as to his oldest son, or to his children generally, and thus create a species of proprietorship in lands, afterwards known as an entail. The provisions of these charters of course varied, depending upon the pleasure or caprice of the person who originally disposed of the land by their means, whether king or private individual.

§ 385. The transfer of landed property might be completed without any writing, in which case it was evidenced by the delivery of some symbolic token. Thus upon the conveyance of the absolute right to the land, some portion of the very soil, a turf or a stone, was handed to the purchaser in the presence of witnesses; when only an usufructuary interest, or right to the profits of the land, was parted with, some product of the soil, a rod, or branch, or straw, was given. At a later time the evidence of the transaction was more often committed to writing, and the charters thus became the foundations of the rights of the possessor, to which he must refer for proof of his claims.

### III.—OF THE POLITICAL ORGANIZATION, THE GOVERNMENT, THE MEANS OF ADMINISTERING JUSTICE, AND OF AFFORDING PROTECTION TO LIFE AND PROPERTY.

§ 386. 1. Numerical and Territorial Divisions.—The free Anglo-Saxon people and their territory were divided up, for the purposes of the civil administration and of the preservation of the peace and mutual protection, into separate local organizations. At the basis of this lay two elementary principles; the tie of the family, kindred, or clan; and the tie of territory. Among all the Germanic nations, the idea of family was one of great power. The primitive form of these ultimate communities was that of septs, or kindreds; but these in time gave way to others.

§ 387. (1.) *The Tything.*—During the period of Anglo-

Saxon history with which we are the best acquainted the Tything is the elemental division. This does not seem to have been founded upon a territorial basis, but was composed of ten families or households of free men, not in the "mund" or under the protection, as vassals, of a superior lord. The head or officer of this small organization was the tything-man, answering to the "Decanus" among the Franks. The peculiar function of the tything will be explained in the sequel.

§ 388. (2.) *The Hundred.*—This was the division next in order to the tything. Its exact organization is shrouded in much doubt. It has been assumed to have been composed of a hundred hydes of land, of a hundred free families, of a hundred tythings, or of a hundred freemen. One supposition would make its basis territorial, the others, numerical. It is certain however that the hundred contained a considerable number of free households; that it was a permanent association; that it had a chief officer or head called the hundred-man; that once in each month the freemen assembled in a district court, whose functions and duties have been already described. This union of the freemen of the hundred into a local tribunal was indeed the distinguishing feature of the institution.

§ 389. The Burgh was only a hundred or a union of hundreds in a more compact form, surrounded by a moat, or stockade, or wall. It also transacted its own affairs by means of its burgh courts.

§ 390. (3.) *The Shire.*—The shires were strictly territorial divisions. Some were in their origin ancient kingdoms, as Kent, and Sussex, others were formed by a dismemberment of these states. The shire having definite boundaries, included within its limits free inhabitants grouped into tythings, and hundreds, and king's thegns with their vassals, and religious houses and corporations with their tenants and dependents. The chief officer was the ealdorman. The local affairs were administered through the shire courts, which have been already alluded to. These Anglo-Saxon territo-

rial divisions, together with some of their powers and privileges, have been retained to the present time in England and most of the American States. Our own counties, with their local legislation, represent the Saxon idea of a political organization, in withdrawing the administration of much that concerns the interests of the people, from the central or imperial government of the state, and confiding it directly to the body of the citizens within the limits of the district.

§ 391. 2. THE EXECUTIVE AND ADMINISTRATIVE OFFICERS. (1.) *The King.*—Among the Saxons, as among all other Germanic tribes, in their primitive condition, there was no king, in the strict sense of that term. The Saxon name, "Cyning," had a far different meaning from that which we give to the word king. He was an elective military chieftain of tribes and peoples, not of a territory. At the time of the invasion of Britain, there were many of these separate and independent leaders; but as the weaker tribes succumbed to the more powerful, and the octarchy was established, their monarchs were yet styled the kings of the people, not of the country.

§ 392. As the state advanced and finally became united under one head, the power of the crown gradually increased. This was due to many causes; partly to the growth of an idea of national unity, and partly to the influence of the clergy, who, directly connected with Rome, and drawing thence most of their opinions, preserved and inculcated the traditions of the later empire, and sought to build up the royal power, and, by becoming its champions, to increase and establish more firmly the authority of the church.

§ 393. The king as the superior person of the nation was distinguished by a larger "wehrgyld," or value, than that of any other; he presided over the witena-gemote, or great council of the state; was the final judge to whom disputes must be referred which could not otherwise be decided. From the time of Aethelbirht, king of the Kentish people (A. D. 597–616), at least, he issued laws, with the consent

and sanction, however, of his great council. All of the codes collected in the "Ancient Laws and Institutes of England" recite that the king enacts or commands with the advice of his "witan." He had also the power of appointing the ealdormen, and other subordinate officials.

§ 394. As the primitive tribal chieftain was elective, so, to the close of the Saxon dynasty, the crown was never strictly hereditary. Although the royal power was in general confined to one family, yet the laws of descent, as observed in modern monarchical governments, were not followed; the immediate heir of a deceased monarch was often set aside, and some other member of the family, perhaps in a collateral branch, was chosen. It was, of course, necessary that the important functions of the head of the nation should be lodged in the hands of an individual able to administer them with firmness and vigor. The king was then in truth elective; the important duty of designating him belonged to the witena-gemote, but the choice was confined to a limited number of persons.

§ 395. (2.) *The Ealdorman.*—The principal officer of the shire was the ealdorman. In primitive times he was the elected chief; in later times, when the royal power had been much augmented, he was appointed by the king with the consent of the council. His official duty, which most concerns our enquiry, was that of presiding in the shire and hundred courts, assisted by a bishop.

§ 396. (3.) *The Gerefa.*—Another officer was the gerefa. This was a generic appellation. The gerefa of the shire was a royal functionary, who assisted the ealdorman and represented him in his absence, taking his place as president of the local courts. From this term shire-gerefa, or its equivalent shire-reeve, we derive our sheriff. The manors, described in this chapter, had also their executive officer, the tun-gerefa, who was the fiscal agent of the lord, assisted him in the regulation of the domain, represented him and the community in the hundred and shire courts, and presided

in the court of the manor. He was chosen by the tenantry.

§ 397. 3. JUDICIAL AND ADMINISTRATIVE ASSEMBLIES. (1.) *The Hundred and Shire Courts.*—The composition of these tribunals and their power in deciding controversies have already been sufficiently described. They were also courts of voluntary as well as contentious jurisdiction. All transactions by which property might be acquired or lost, the purchase and sale of land, the payment of money, were effected in the assemblies of the hundred. Here charters or deeds were produced and read, or, if they had been lost, they were re-established and confirmed. The shire court possessed the same jurisdiction as that of the hundred, and an appellate power in addition.

§ 398. (2.) *The Witena-Gemote.*—This supreme court and general council of the kingdom possessed functions more extensive and national than the moots of the shire and of the hundred. In respect to its composition there have been many opinions. It appears certain, however, that none of its number were elected or chosen to represent a body of people by any process analogous to the choice of members of the English House of Commons. Prof. Lappenburg declares that "there is no reason extant for doubting that every thegn had the right of appearing and voting in the witenagemote, not only of his shire, but of the kingdom." (Hist. Anglo-Sax., vol. ii, p. 317, Thorpe's Trans.) In addition to these members, an ecclesiastical element entered into its composition, consisting of archbishops, bishops, and abbots. Its judicial functions have been already described. The general powers of this council, as abridged from Kemble, were as follows.

1st. They possessed a consultative voice, and a right to consider every public act, which could be authorized by the king.

2d. They deliberated upon new laws which were to be added to the existing folk-right, and which were then promulgated by their own and the king's authority.

3d. They made alliances and treaties of peace.

4th. To them belonged the duty of electing the king.

5th. They had the power to depose the king, if his government was not for the benefit of the people.

6th. In connection with the king, they appointed prelates to vacant sees.

7th. They regulated ecclesiastical affairs.

8th. They levied taxes for the public service.

9th. They raised land and sea forces when required.

10th. They had the power of recommending and assenting to the grants of land, and of permitting the conversion of folk-land into boc-land.

11th. They possessed authority to adjudge the lands of offenders and intestates to be forfeited to the crown.

12th. They acted as supreme court of justice both in criminal and civil matters.

§ 399. 4. Frank Pledge.—The institution which presents the Anglo-Saxon civilization in the most striking light, was that of Frank-pledge, or "Freeborgh." This was a species of internal or domestic police, by which the majority of free citizens, whether noble or common, were charged with a responsibility, not only for themselves, but also for the behavior of certain of their fellows. It did not create the citizen's duty toward his neighbor and toward the state, but was only a means of enforcing that duty. Frank-pledge was divided into two branches.

§ 400. 1st. It included that personal liability of a superior, which made him the surety ("borh") for his vassals and dependents. Not only was every lord burdened with a responsibility for his tenants and retainers, but every head of a family must protect and answer for those in his "mund," his wife, children, and slaves. The lord was obliged to respond for the offences of his vassals and retainers, that is, he must see that they were brought to justice. If a vassal accused of crime should abscond, his superior forfeited the fine to the king. If he himself was suspected

of conniving at the offence, or at the escape of the offender, he was forced to clear himself by his own oath and that of five other thegns as compurgators.

§ 401. 2d. The second species was the collective Frank-pledge, enforced by means of the tythings. The object of these small communities was, that each man should be in pledge or surety (borh), as well to his fellows as to the state. As each tything was composed of a small number of members, neighbors to each other, it was possible that each individual should be under the constant and close scrutiny and espial of the rest of the association. Thus all the individuals united in a single tything were joined together by a bond of common interest and common fear; they were, in a measure, isolated from the rest of the state; they were bound to present their fellows, if charged with an offence, before the court; they were to hold the criminal to answer; their first duty was to produce him if he could be found; they were to clear him of the charge, if possible, by oath, and to aid in paying his fine if declared guilty; if he fled, they must purge themselves of all participation, as well in the crime as in the escape, by their oaths, or even must pay the fine adjudged against him; they received a portion of the compensation for his death; they were his natural compurgators or witnesses.

§ 402. I have already said that the tythings were assemblages of free men only. The entire community, with respect to the institution of Frank-pledge, was separated into three general classes. 1st. The archbishops, bishops, abbots, thegns, and other lords, who, as superiors, having large estates peopled by their vassals or retainers, were answerable for these dependents, and were not included in any tything, and consequently were not burdened by the restraints of the collective suretyship, but were pledges for others, their inferiors. 2d. A class of individuals who were not pledges for others nor yet for themselves, but escaped the espionage of the system, including priests, women, and

those who, though not lords, possessed a freehold or absolute property in land, sufficient to be security for their good behavior. 3d. Those enrolled in tythings, who were surety for each other. As the state relied so entirely on this institution to enforce obedience to the laws, and give protection to the lives, persons, and property of its citizens, it required, with the most scrupulous care, that all free persons, not included in either of the first two classes, should be joined to some tything. Any failure on the part of one of these associations to enrol a new comer, was visited by fine.

§ 403. 5. THE PREVENTION AND PUNISHMENT OF CRIMES. To attempt more than a general outline of this subject would lead me into a minute and unnecessary detail. The principle was fundamental, not only among the Anglo-Saxons, but among the Germanic nations of the continent, that almost all offences against person, property, or life, were punished by pecuniary mulcts. The Anglo-Saxon state was far enough advanced in civilization to recognize the truth that a crime is not only an invasion of the rights of the injured person, but also of the sovereignty of the State. It therefore provided two species of fines; one the "Wehr," awarded to the sufferer, or to the relations of a person violently killed; the other, under the generic name of the "Wite," to be paid to the state, or to the official in whose jurisdiction the crime was committed. "Wehr" was, then, a compensation for an injury; "wite" was, in modern language, a fine, and varied with the rank and importance of the person to whom it was due. Connected with this, and modifying its application, was another no less fundamental principle, that the state did not regard the lives and persons of all individuals as of equal consequence, but annexed a different value to each, according to their status or rank in society. The compensation for the life of a king was the highest on the scale; following which was that of exalted ecclesiastics like archbishops, and important officers like ealdormen; inferior to these was that of eorls and thegns;

and lowest of all was that of the ceorls. The fines for injuries not destructive of life, but affecting the person, followed the same gradation. It would be useless to detail the various fines apportioned to particular offences. Every possible act of violence had its appropriate compensation, and the greater part of the ancient codes is occupied with a careful and often ludicrous minuteness of specification of illegal trespasses, and their accompanying fines.

If the criminal appeared, and was tried and condemned, the "wehr" and the "wite" were payable out of his own property. In case of his absconding, his relations or his tythings were responsible for the mulct. The relations of the person slain received the whole wehrgyld annexed to his rank in the community.

§ 404. Crimes were divided into two classes: 1st. The bote-loss or inexpiable, for which death was inflicted without any remission. In this class were included treason, desertion of the standard of one's lord, open theft or rapine, housebreaking, and murder, as distinguished from manslaughter. 2d. Those for which the offender might redeem himself by the payment of the stated penalties. A specified time was allowed in which this payment could be made. According to Lappenburg, the order of satisfying the several demands in case of homicide was as follows: 1st, the king's "mund," or fine for the breach of the king's protection; 2d, the "man-bote," or indemnity to the lord of the slain; the amount of which was regulated by that of the "wehr;" 3d, the "fyht-wite," due to the crown for the breach of the peace, and lastly, the "wehrgyld."

§ 405. Two methods were permitted by which a rude species of punishment might be inflicted upon a criminal. The personal vengeance of the injured party and his relatives against the trespasser and his kindred, was the means of enforcing a summary justice in the one case; the slower but more regular judicial process was resorted to in the other. The first was termed the "feud," or private war,

fare. When blood had been shed, the relatives of the slain could pursue and put to death the slayer; or, if he had escaped to his own dwelling, they might declare hostilities against him, which was termed "raising the feud." In case a "ceorl" had killed a noble, the death of six of his relatives was alone sufficient to make reparation. This license certainly marked an exceedingly savage social state, but it seems to have been common among all the Germanic tribes, and was restrained by certain regulations, which, however, were doubtless often broken through in the ardor of family enmities.

§ 406. When a capital offence, such as open theft, had been committed in the day, and certain evidence of the crime was found upon him, the offender might be put to death without any form of trial. But this punishment must be inflicted immediately; the intervention of a single night made more solemn and orderly proceedings necessary. This right of summary punishment belonging to a manor or domain was termed "Infang-thief."

§ 407. When a judicial investigation was necessary, the criminal might be formally charged with his offence in three modes: 1st. By the presentment of the hundred through the action of twelve of its chief citizens, who with the gerefa were sworn not to accuse an innocent person, or conceal any crime. In this form of proceeding, we have the plain origin of our grand juries. 2d. By the presentment of three or four men of the neighborhood or township; 3d. By the injured party himself, who was sworn not to act from malice, and his oath required the confirmation of seven compurgators.

§ 408. The charge having been formally presented to the court, the first step was to secure the attendance of the suspected culprit, which was effected through the institution of Frank-pledge. Should he fail, however, to appear and answer the accusation, the pecuniary penalty fell upon his relations, or, in want of them, upon those who were his "borh" or surety.

§ 409. On the trial, as has already been described, no evidence, in any true sense of the term, was introduced; no attempt was made to examine the facts, or weigh the probabilities; the sole reliance was upon compurgation and the ordeal. In this also the rank of the accused modified the severity of the scrutiny. The oath of one noble was equivalent to that of six ceorls. If the culprit were a ceorl, he must first call upon his lord to testify whether he had been guilty of crime before the present charge. When the result of this enquiry was favorable, the defendant could clear himself by simple compurgation or simple ordeal. By the first, the oaths of a proper number of his fellows must support his innocence; by the second, he plunged his hand into boiling water up to the wrist, or carried a hot iron in his naked palm nine paces. If these oaths were procured, or if the ordeal resulted in no serious injury, he was acquitted. When, however, the testimony of his lord marked him as a man of doubtful character, the compurgation was tripled in the number of oaths, and the ordeal, in the severity of its infliction. If the result was unfavorable, the accused was condemned, and must redeem himself by the payment of the appointed fines to the state, and compensation to the injured party, or his relations or tythings.

§ 410. I have thus given a very general outline of the more important Anglo-Saxon institutions. To notice the minuter variations, special provisions, and occasional changes, would lead me into too wide a discussion, and would not aid the purposes of so elementary a work as this. Enough has been said, however, to indicate those of our own legal ideas and forms which have a Saxon origin.

§ 411. Prominent among these is that most important, and to us sacred principle of local self government. This element lay at the foundation of the whole Saxon polity. It has been preserved in the English shires and ancient municipal corporations or boroughs with their immemorial privileges. In many of the American states it is guarded with

even more jealousy than in the mother country. The New England and New York divisions of towns, each with its own officers, and stated convocations of citizens, and of counties, each with a local representative assembly legislating for much that concerns the welfare of the district, and a court possessing a jurisdiction coextensive with the territorial limits, embody with much simplicity and purity the essential idea of the Saxon commonwealth.

§ 412. In the witena-gemote, we may perceive the earliest phase of that body, which, through a long succession of changes, finally became the English parliament and American legislature. It must not be supposed that the Saxon council bore any resemblance in form to these later assemblies. It was not elective; it was not strictly representative; but it had a right to unite with the king in controlling the administration of the national affairs.

§ 413. From the constitution of the Saxon courts, formed of good and true citizens, who took a part in the decision of all legal controversies, we derive the idea, the fruitful germ of our trial by jury.

§ 414. In the tythings and mutual and class suretyship, we have the origin of our practice of requiring bail to be given for the appearance of offenders charged with crimes. The collective Frank-pledge has long passed away, but the principle of relying on one person as a pledge for the obedience of another is yet preserved by us, and is in constant use.

§ 415. To the Saxon system of compensation to the suffering party as the universal form of penalty for personal trespasses, we must refer as the origin of our method of inflicting penalties for most private injuries to person and property, by pecuniary damages.

§ 416. Finally, from the whole spirit of the Anglo-Saxon race, as shown through their laws and institutions, we have inherited our own native self-reliance, and love of personal liberty.

## CHAPTER II.

### THE FEUDAL SYSTEM

§ 417. ANOTHER one of the sources which have contributed much to form the composite structure of English and American law, is the feudal system. The state of society which grew up under this form of civilization was certainly picturesque. Its princely estates, its massive castles, its rugged barons, its chivalry and knight errantry, have all afforded an ample field for the poet, the novelist, and even the historian; but under these outside appearances, there lie vast and firm strata of legal institutions and principles, which must carefully be dug over and explored by the student who would understand the familiar law of the nineteenth century. Castles are moss-grown and crumbling in the dust, manors are built over with cities and threaded with railways, chivalry expired under the remorseless sarcasm of Cervantes, but the simple deed by which the entire title to an American farm is conveyed, refers back, for its complete explanation, to the time when all these institutions were flourishing in their full vigor.

§ 418. The law of feuds was in the highest degree arbitrary; it had no basis of abstract right; it paid little heed to the requirements of justice. It was an unfolding of the national customs and institutions of tribes, barbarous and wild in their culture, but possessing great energy, activity, courage, and the power of developing into the peoples which

are now the very flower of a Christian civilization. The animating spirit of feudalism, both as shown in the general structure of society, and in the legal institutions upon which society rested, was military. The rulers and leaders in the state were military chieftains. Every person of gentle birth was trained to arms. All forms of labor and handicraft were rude and degrading, and left to those who occupied the lowest stations in social order. The only property which the law cared for was land. Personal property was little in amount, and less in value. The feudal law then, as a system of municipal regulations, is entirely confined to what the Roman jurisprudence denominated immoveables. Following its animating spirit, the system fettered landed property with an intricate network of arbitrary rules, which were designed and well adapted to preserve wealth and power in the hands of a few; which were restraints upon transfers of the soil from one occupant or holder to another; which were a virtual destruction of all trade, and commerce, and spirit of enterprise; and which drew deep, and broad, and lasting, the lines of distinction between the various classes and orders of society in the state.

§ 419. As will appear in the course of this chapter, these restrictions upon the free life of the nation, which were so great when the system was most flourishing, began to grow too grievous to be borne, and they necessarily yielded to the demands of a steadily advancing culture, and have virtually long passed away; but they have left an impress upon our municipal law, which cannot be effaced, as long as we feel the influence of our past history. One of these effects is the marked distinction in the law between real property and personal property. When Lord Coke wrote his Institutes of the Laws of England, between the years 1600 and 1630, the distinction was preserved in all its integrity. At the time of Sir William Blackstone, the law had yielded a little in its preference for, and privileges allowed to, the owners of the land; but still moveables and immoveables were regulated

by a very different code. In the United States, this distinction is in a great measure broken down; but its traces are plainly visible in the rule of law appointing a different succession to the lands and chattels of a deceased person; in requiring a transfer of land to be evidenced by a more solemn instrument under seal; in subjecting the personal property first to the duty of satisfying the debts, either of a living judgment debtor, or of a person deceased, whose estate must be administered by the law. The Roman law knew no such distinction between these two classes of property, and its principles, after being for many centuries displaced by the law of feuds, have gradually reasserted themselves, until in America they are almost triumphant.

§ 420. The general tone, then, of the influence which the feudal law has exerted upon the jurisprudence of European countries, has been to impress a distinctive character upon real property; to withdraw it from trade, commerce and exchange, by hindering its transfer; to retain it in the hands of a comparative few, by separating the absolute ownership from the use and occupancy, and at the same time to depress the value and estimation of personal property. All these peculiarities were and are antagonistic to the general diffusion of wealth, to the progress of trade and commerce, and to all the material development and advance of the present civilization.

§ 421. In the course of this chapter, I shall sketch the history of the rise and progress of the feudal system; explain its prominent features and regulations affecting the law of real property, and the status of the individual; trace more in detail its influence and effects upon succeeding and modern jurisprudence, and set forth the causes which led to its decline and abandonment.

§ 422. The feudal system had its origin among those barbarian nations which spread over a great part of Europe, and overthrew the Roman dominion. During the sixth century, these invasions had become so extensive that little re-

mained of the western empire. Spain was held by the Visigoths and the Suevi. The Franks and the Burgundians had invaded Gaul, and the former tribe, being the more powerful, had extended themselves over its territory, and gave to it the name of France. The Saxons had overrun England, and the Lombards had penetrated to Northern Italy, and there founded a kingdom. These invaders were distinct nations, spoke different languages, followed different leaders; yet they had the same ethnic origin; they were nearly related in the same family of tribes.

§ 423. The researches of modern ethnology and comparative philology have established, beyond a doubt, that these several nations, issuing out from the wilds and woods of Germany, were portions of great Indo-Germanic migration, which had, at vast intervals of time, thrown wave after wave of peoples, from Central Asia, across the continent westwardly to the shores of the Atlantic. Whatever may have been their external variations of manners, laws, and languages, there ran through all a connecting tie, which betrayed their common origin and close relationship. With great outward differences, we may assume that their national policy and institutions were rooted in the same ethnic customs and characteristics.

§ 424. It is beyond dispute that the feudal system had its origin, and was brought to perfection, among these nations which overthrew the Roman empire. It was found among the Lombards in Italy, and the Franks in Gaul; among the Visigoths in Spain, and those Germans who did not join the hordes who poured out upon the Roman provinces. The Northmen or Normans, sweeping down from the shores of Scandinavia, and partly by force, partly by concession, becoming masters of the district of Normandy, brought it to a high degree of perfection. We have, in the preceding chapter, seen the essential features of the system in operation among the Saxons in England prior to the Norman conquest, although among them the elements of personal individual

freedom of the citizens, and local self government, had offered a more successful and continued resistance to the encroachments of the feudal polity upon the ancient order of things, than among the kindred tribes on the continent.

§ 425. The question which first meets us is, whence was this system, so extensive and so unique, derived; what country or race was the cradle of its germinal ideas?

Sir William Blackstone and some other writers whose historical researches were not profound, represent the Teutonic nations as bringing with them, in their resistless march, the feudal policy in a condition fully developed, a recognized part of their national customs, and imposing it upon the conquered provinces of the Roman empire. This supposition, however, is plainly erroneous. The investigations of modern historical students, who have had access to records of which Sir William Blackstone was ignorant, have done much to dispel the clouds which hung over and obscured the national life of Italy, Gaul, Spain and Britain, during the few centuries immediately succeeding the barbarian conquest.

§ 426. The general result of this examination, laboriously made by the most careful of students is, that the Germanic nations in their primitive tribal customs and institutions possessed the germs of the feudal system in an undeveloped state; that the settlement of these peoples upon the soil of the Roman provinces afforded an opportunity for these seeds to spring up and grow; that as the barbarism of the invaders gradually softened, and the smaller tribes were consolidated into larger nationalities, the new circumstances of their position demanded a change in their institutions, which was effected, not by creating anything entirely new, but by expanding and adding to that already familiar. After the lapse of several centuries, society became completely reorganized, and land, the important species of property and chief source of wealth, became subject to the regulations of the feudal régime. This account of the rise of the system would give it a strict ethnic origin among the Teutonic

tribes, and a growth quickened and aided by the requirements of new circumstances, and particularly by the demands of a civilization military in its character.

§ 427. Sir Francis Palgrave, in his great work on the Rise and Progress of the English Commonwealth, has advanced a theory, which has been adopted and dogmatically stated by Mr. Spence in his very able Treatise of the Equitable Jurisdiction of the English Court of Chancery, that the rules of landed possessions which have been supposed to be peculiar to the feudal system, and to form its most important element in moulding the subsequent law of real property, were neither invented by the Germanic nations, nor historically developed by them from their tribal customs, but were borrowed by them from the Roman law, which prevailed in the provinces prior to the invasion, and added to their own rude legislation. The work of Sir F. Palgrave is one of vast learning and of great authority, and that of Mr. Spence is undoubtedly the most valuable contribution to mere legal history ever made by an English lawyer; yet I am strongly of the opinion, and in this am confirmed by some of the most able modern historians, that their theory is a generalization from an insufficient number of facts; that it is founded upon merely incidental resemblances, without a due consideration whether these resemblances are anything more than casual, whether they have any necessary bond of origin and result connecting them; and that it is opposed to all the analogies and facts of history.

§ 428. The purpose and limits of the present work do not require nor permit a careful discussion of the question thus stated. There are some considerations, however, which will aid in reaching a correct conclusion, and which seem to incline strongly against this latter hypothesis.

There can be no greater error in historical investigations, than the conclusion that, because of a resemblance between institutions of two different nations, not contemporaneous, the later in time has borrowed from the former. Many of

these resemblances are entirely casual; many such institutions and customs are those which seem to be the natural product of barbarism, and to be common among people widely separated in time and space. Thus the earliest stages of all national life and progress are distinguished by an attachment to, and employment of, arbitrary forms. We shall see in the succeeding chapter that, in the semi-barbarous periods of the Roman commonwealth, certain species of property were marked by very peculiar and arbitrary characteristics, that their transfer could only be made in a manner highly artificial and symbolic, in the presence of witnesses, and before a public officer. Our examination of the Saxon laws has shown a custom quite analogous prevalent among them; the sales of goods and chattels must be made in public, in the presence of witnesses and before officers; the conveyance of lands was symbolized by the delivery of a handful of soil or such like emblem. It would be an extravagance, however, to infer from this plain similarity that the Saxons had borrowed this article of their customary or statute law from the ancient Romans. Both observances were the natural and inevitable birth of barbarism.

§ 429. Now the essential feature of the feudal regulations of landed property, was, that the absolute ownership resided in one person, the lord, while the actual occupancy and possession and use of the proceeds and fruits, and therefore a subordinate kind of ownership, was enjoyed by another, the tenant. Coupled with this principle of distributing the ownership, was another, which defined the peculiar relation between the individuals who held these two rights, which created a military tie of superiority on the one side, and dependence on the other, of protection and faith. The latter is confessedly the outgrowth of primitive Teutonic customs; the former bore some likeness to one method of holding lands among the Romans, but the similarity extends further, and may be detected even among the institutions of some Asiatic states. The writers mentioned have been

struck by this resemblance, but seem to have overlooked the fact that the principle of dividing the ownership of the soil is one likely to be found in some form among the customs of all nations which prize the possession of lands. In truth, these two ideas in the feudal system, of the tie between the superior and the vassal, and of the distinct right of property in the land which belonged to each, should not be separated. The personal relation was purely and primitively Germanic; the other, in the progress of time, by the consolidation of the people, by the necessity of providing strength for military enterprises, by the gradual aggrandizement of the nobility, was the natural product of this already existing relation.

§ 430. The fact that these essential elements of the feudal polity were found among those Germanic tribes not directly in contact with the Roman civilization as well as those who were, adds much to the probability of the Germanic origin of the whole system. We have already seen that it had commenced and considerably advanced among the Saxons in England, who certainly were not brought into contact with the remains of the Roman provincial legislation in a sufficient degree to have exerted any decided influence on their national policy. The ecclesiastics had indeed become propagandists of the ideas of the now fallen empire, but their labors had been confined to the enlarging the powers of the king, to the clothing him with the attributes of the Roman emperor, and had not extended to the subverting and overturning the ancient laws of the kingdom. This point will be more fully brought out in the succeeding chapter, when I come to speak of the history of the Roman law during the middle ages. It is enough now to say that in those parts of France where the Roman law retained its greatest influence, where the people were chiefly of Roman descent, the feudal régime was always the weakest; there the larger portion of the landed property was not for a long time brought under its restrictions; while in the

northern regions of the kingdom, from which the Romans had been almost entirely driven, and their places occupied by the invading Franks, and where their law had yielded completely to the Germanic customs, the feudal system flourished in its greatest strength and vigor. It seems to me that this historical fact is entirely inconsistent with the assumption of a Roman origin for the feudal regulations of landed property.

§ 431. To this may be added an argument drawn from ethnological science. The prevalence of the feudal policy as a part of the institutions and laws among so many nations, separated, indeed, in government, but one in race, strongly indicates that the system had its roots in their common race-origin. No fact is more palpable in history than that the characteristics of race, by some means stamped indelibly into the individual and upon the common brotherhood, are preserved, modified, perhaps, but not obliterated, through centuries of change, through the rise and overthrow of governments and empires, through the progress from barbarism to the highest state of civilization. As languages indicate their descent through the most radical convulsions of the state and the people, so do the tribal institutions and customs perpetuate themselves from generation to generation. Thus the prolific germ which can be traced back into the swamps and forests of Germany among the fierce and independent Saxons, has developed a growth, which, surviving the invasions of Danes and Normans, has given to England its free constitution, and is working out its perfect fruit in the individual liberty and local governments of the United States. It would seem, then, to be in accordance with the analogies of history to infer that the feudal civilization, with its peculiar class divisions and relations and rules of territorial property, was based upon a foundation of race or tribal customs common to all the barbarian peoples who established the western nationalities of Europe.

§ 432. The argument from authority is entirely opposed

to the theory of Sir Francis Palgrave. The conclusions of Savigny, in his exhaustive History of the Roman Law during the Middle Ages, all tend to give the feudal system a Teutonic origin. He sums up the discussions of one chapter with these propositions, which I have condensed. The ancient Germanic constitution comprised three classes of persons, the noble, the free, and those who were not free. When the Germans established themselves on the soil of the Roman empire, the Germanic organization continued the same, while the Romans were also permitted to remain as occupants of a portion of the territory. After the lapse of time, the personal and feudal service created a crowd of new relations, which gave birth to new names for classes of nobles, "Anstrustiones" in the Frankish empire, "Capitaniei" and "Valvassores" in Italy. Without doubt the germ of these institutions existed already, but the founding of the new Germanic states hastened and favored their development. To these changes in the state of persons there responds a similar change in the territorial property. According to the ancient constitution, absolute property was inseparable from the status of a freeman, and under this relation nobles had no privileges. But the feudal régime remodelled society, and the principle of ownership partook of the alteration in the condition of persons. This summary has reference only to the Germanic nations upon the continent, who from the beginning were mingled with a large element of Roman provincials; but it entirely agrees with the description given in the preceding chapter, of the gradual transfer of the Saxon free nobles by birth, into the class of nobles by service, and the partial conversion of simple freemen into the state of vassalage and dependence upon a lord, and of the absolute property in land—the "alod"—into the feudal condition of an ownership subordinate to the rights of a superior. Since the publication of Palgrave's work, his positions, which I have mentioned, have been implicitly combated by Mr. Kemble, and di-

rectly and successfully attacked by Prof. Lappenburg, in their histories of the Anglo-Saxons.

§ 433. Whatever may have been its national and historic source, it is certain that the feudal system is found firmly established through the empire of Charlemagne before the year 800, in all its essential features, and also prevailed among the Saxons in Britain, though it did not arrive at its maturity and full development, with all of its restrictions and onerous servitudes, before the eleventh century. The Norman invaders of England under William, in the year 1066, brought over the system in a state far more developed than that which existed among the Saxons, and established it with all its rigorous strictness throughout their new possessions, and from that time the law of England bears the deep impress of this peculiar policy.

We are now prepared for a general description of the feudal civilization, and regulations affecting land, from its introduction, so far as has been discovered in the records of early times, until it became definitely established as the law of tenures in England.

§ 434. There may be different kinds of ownership over landed property. In one, the land is in the absolute control and direction of the owner and possessor. In other words, the right to the soil, and to the profits of the soil, meet in the same person. He possesses the *dominium directum*, and the *dominium utile*. Land thus held is termed allodial. We have seen the original of this word in the "alod" or inheritance of the primitive Saxon. Such is the character of the ownership of real property in the United States, and it is the simple, natural, and just method of dividing up the territory of a country among its inhabitants. So accustomed are we to this species of proprietorship, that we can hardly conceive of any other, and by far the greatest difficulty which the student of law has to encounter, is in divesting his mind of the preconceived notion of the necessity of such a possession and dominion.

§ 435. The whole feudal policy, so far as it was a system of laws regulating real property, proceeded upon the contrary idea that the absolute ownership of land, or the *dominium directum*, was in one man, while the actual possession and profitable use, or *dominium utile*, was in another. The study of the feudal system as a portion of legal science, consists in explaining this double ownership, and the consequences to each party which flowed from it, and the rules by which it was governed.

We are now to inquire how this peculiar condition of landed property grew up and became universal.

§ 436. The description given in the preceding chapter of the primitive social order among the Saxons, and of the gradual change into the feudal constitution, by the development of the class of the unfree, will apply in its general features to the Franks in Gaul, and to the other Germanic nations in western Europe. With them there were three ancient classes, the noble, the free, and the unfree; the nobles had no privileges which did not belong to the simple free men; the absolute ownership of land was indispensable to the enjoyment of the privileges of freemen. But in the midst of this ancient order of freemen, each the absolute owner of his own possession, the king was continually drawing about him a company of followers, retainers, and dependents, whom he favored, rewarded, and ennobled. In the process of time these nobles by service, known among the Franks as Anstrustiones, and among the Lombards as Valvassores, absorbed into their ranks the primitive nobles by birth, and the inferior orders of society passed into a condition of vassalage to them.

§ 437. When the Roman provinces were overrun by the Germans, a great part of the lands were seized and held by the conquerors. With the private municipal law of the conquered, it was no part of the policy of the barbarian invaders to interfere. In this they differed from the custom of the Romans. When the latter people had reduced a for-

eign nation to subjection, it was one of their first steps to introduce their jurisprudence over the new province. The Franks were satisfied, on the contrary, with leaving the old masters as they found them; and for a long period of time the conquered Romans and Gauls and the conquering Franks lived side by side, the one governed by the refined laws of Rome, the other by the rude customs of Germany.

§ 438. But the fierce warriors of Clovis would not be satisfied without a large portion of the possessions which they had wrested from their former owners. These lands were partly distributed among the invaders, and a large share fell to the king, under the name of fiscs, which remained under his control, similar to the folkland of the Saxons. Those of the ancient proprietors who retained their property or portions of it, held it, without doubt, as allodial land, according to the old law. According to their ancient and familiar customs, the allotments distributed among the Frankish freemen and nobles were received, held, and enjoyed by them as their absolute property. Many writers on the feudal law, and among them Sir William Blackstone, represent the king as seizing all of the lands which were not left to the former inhabitants, as his own, over which he assumed the complete dominion, and as subsequently granting them out in portions to his military chieftains and followers. If this were the fact, it would furnish a ready and complete reason for the feudal rule of law in England, that the king is the original owner of all the landed possessions in the kingdom. But the researches of those who have studied the records left to us of the early polity of the Franks, show conclusively that the early Frankish kings possessed no such power; that they, as well as others, received their own private share of the lands; that they exercised a control over the fiscs, but that the greater part of the territory was divided up among the free warriors, who held the shares as their own inheritances.

§ 439. The king, being thus in possession of a large

quantity of land scattered throughout the realm, had the means of rewarding the faithful retainers with whom he was gradually surrounding himself, and this he did, by making to them grants of land under the name of benefices. Under these beneficial grants, we find the first historic traces of the peculiar characteristics of the feudal system. The benefice was not an absolute gift, vesting the recipient with the ultimate ownership; that still remained in the king, and the grant was liable to be revoked at any disloyal or hostile act of the beneficiary. In return for this gift to him from the monarch, the subject was bound to give to the king, when called upon, his military service and aid, from time to time, as they should be required. Thus the favored subject entered into the possession of the land and enjoyed all of its benefits as though he were the absolute owner; still, as he was not the absolute owner, he was said, in the subsequent language of the feudal law, to *hold* the land of his sovereign, and the method or relation by which he thus held was denominated a *tenure* or holding, and all tenures were at first of a military character, because they only required that the tenant should furnish military aid to the king, as a recompense for the possession which had been granted to him.

§ 440. It has been a disputed question, for how long a time these benefices were originally granted. Sir William Blackstone asserts that the fiefs were originally precarious, and liable to be revoked, without cause, at the will of the monarch; that by the gradual progress of the system, gifts for life took the place of the uncertain benefices, which, upon the death of the tenant, would return again into the possession of the king, to be again granted out; that in such new allotment, the children of the deceased tenant would prefer the strongest claims upon the bounty of the king; and so it grew to be the practice, as a matter of course, to reinvest the child or children of a dead vassal with the lands held by their father; that this practice, commencing as a

favor, came at last to be considered as a vested right, until all fiefs, either by sufferance, or by their original creation, were turned into inheritances, descending from father to son, subject only to the returns and other charges which were established and regulated by the feudal law. More recent and learned writers deny the entire correctness of these statements, and insist that there is no record or other evidence that the benefices were ever revocable at the pleasure of the king, without some delinquency on the part of the tenant. It would seem to be the better opinion, that these grants of land were, from the first, for the life of the holder, or hereditary. All agree that, whether the fief were precarious, for life, or hereditary, it would be forfeited and return to the king, upon any failure of faith and duty on the part of the tenant.

§ 441. The first great change in the simplicity of the feudal system, was the practice of subinfeudation. When benefices had become hereditary, those great vassals who held immediately from the crown, began to grant parcels of their land to other tenants, to be held by them by the same tenure, for the same services which were rendered by the chief to the monarch. Thus there were two classes of tenants, the first holding from the king, but lords over their inferiors. This process of dividing and subdividing was continued until many ranks of tenants intervened between those rude persons who actually tilled the soil, and the monarch, who, originally in fact, but now hardly more than in name, was the ultimate owner of the soil. This practice of subinfeudation in France, together with the vast possessions held by a few of the crown vassals, reduced the power of the king in the tenth century to a mere shadow, and left him the actual government of but a mere fraction of the territory.

§ 442. By the process of subinfeudation, the count or duke holding a large province, although in theory a vassal of the crown, and owing allegiance and military duty, be-

came in reality an independent sovereign. The general national allegiance of the inhabitants of each county or dukedom was transferred to their immediate lords, and the feeling of national loyalty was supplanted by the feudal tie of each person to his direct superior. The great nobles assumed the character of independent princes, and the lesser lords were not slow in following the example, and exercising supreme control over their smaller baronies. This internal condition of the country was much more marked in France than in England, for although many of the English barons were very powerful and turbulent, yet none approximated to the state and condition of the French counts and dukes. It was the policy of William the Conqueror to divide up the territory into a large number of fiefs, so that no one noble could hold a great preponderance over the others, or approach the power and dignity of the king. The natural result of this destruction of the central power in the kingdom, and multiplication of independent or semi-independent nobles in France, was to throw the whole country into a state of confusion; petty wars between different feudal lords were constant; no general law was acknowledged; no rights of property or person were respected; the only means of comparative safety and immunity from attack was found in the feudal protection of a powerful baron. This internal condition of the country brought about another great change in the disposition of landed property.

§ 443. It has been said that at the Frankish invasion, those of the old proprietors who retained their lands, held them as allodial, and that a large portion of the barbarians received their shares in the same kind of ownership. These proprietors were now brought into a deplorable condition. Having no resource in the authority of the king, and no protection from the laws, they were exposed to the continual rapacity of the counts, and other nobles. The owners of the castles and fastnesses would sweep down upon these proprietors, ravage their possessions, and carry them off, to

be ransomed at any exorbitant charges. The military tie of lord and vassal was the only barrier to these continual attacks, for while it imposed a duty of warlike service upon the vassal, it also afforded the protection of the lord. An allodial proprietor had no such security, and his only safety lay in a compromise. Thus began the custom of the allodists surrendering their lands to some feudal lord, and receiving them back from him as his vassals. To such an extent was this practice carried, that during the 10th and 11th centuries it appears that almost all the allodial lands of France were converted into feudal, held by military service, and assuring for their tenants military protection. The general maxim of the feudal law, afterward propounded, was *nulle terre sans seigneur;* and this would seem to have been literally true in England after the conquest, but in France it was never strictly true, for in the southern provinces, or *pays du droit ecrit*, where the influence of the Roman civilization and the Roman jurisprudence was more stropgly and more persistently felt, lands were so generally allodial, that the presumption was in their favor, unless the contrary was shown.

I shall now proceed to explain the peculiar features and incidents of the system, regarded as a code of positive laws regulating the ownership and disposition of real property.

§ 444. The feudal relation of lord and vassal was one essentially of mutual support and assistance. Heavy burdens were laid upon the one, but they all demanded corresponding duties and obligations from the other. If the vassal was bound to furnish an uncertain amount of personal military attendance to his superior, in his wars public or private, and in later times to contribute much money, the lord was in turn obliged to warrant and secure his dependent in the quiet possession of his land, and to defend him against all enemies. Many circumstances contributed to preserve this tie, and to strengthen its bands. It was certainly for the interest and advantage of both lord and vassal, that it should

be kept unbroken. Added to this were those sentiments of lofty honor, which, partly the product of the feudal system, in turn contributed much to its unity and strength. The vassal and the lord were bound by every feeling of personal faith, by the dread of shame and infamy, and by the sanctions of the holy religion, whose outward observances, at least, formed a part of the daily life, to preserve inviolate the reciprocal duty which related them.

§ 445. The ceremonies used in conferring a fief were peculiar and interesting, exhibiting at once the complete submission of the vassal, and the complete transfer of the lands into his possession.

The first was homage. "The manner of entering into the homage of another is this: that is to say, the feudal seigneur must be humbly requested, with the bare head, by his man who wishes to do faith and homage, to be received into his faith, and if the seigneur will, he sits down, and the vassal unbuckles his girdle, if he has one, lays down his sword and staff, kneels on one knee, and says these words: 'I become your man from this day forth, of life and limb, and will hold faith to you for the lands I claim to hold of you.'" This submission was the commencement of the feudal allegiance, which was so strong a tie, and whose breach was the shameful as well as disorganizing treason; whence we have, under such an entire change of national polity and of the organization of society, borrowed our notions and many of our rules relating to national allegiance and treason against the state.

§ 446. The second was the oath of fealty, which was taken after the homage. "And when the freeholder shall do fealty to his lord, he shall put his right hand upon a book, and shall say these words, 'This hear, my lord, that I will be faithful and loyal to you, and will keep faith to you for the lands which I claim to hold of you, and will loyally fulfil unto you the customs and services that I shall owe you on the conditions belonging thereto, so help me

God and the Saints.' And then he shall kiss the book, but he shall not kneel when he does fealty, nor make so humble a reverence as is before prescribed for homage. And there is a great difference between doing fealty and doing homage; for homage can only be done to the seigneur himself, whereas the seneschal of the seigneur's court, or his bailiff, may receive fealty in his name."

§ 447. The third was the conveyance and investiture of the lands. This ceremony was either symbolic or actual. In either case it was public, done before witnesses, and in a solemn manner, so as to take the place of writings. If the investiture was actual, the tenant was taken upon the land, and the possession was formally delivered to him by the lord, or his deputy. If it were symbolic, the lord gave to his new vassal a handful of earth or sod, or a branch cut from a tree, or a piece of thatch from a house, or such like article taken from the soil. These two methods became the livery of seizin, known to the English lawyers as an evi dence of the ownership and possession of lands.

§ 448. The essential characteristics of a feud in its puri ty before it had degenerated from its first simple military character, were the following:

1. The absolute ownership of the land was in one person, called the lord, and the use, occupancy, and profits of the soil were held by another, called the vassal. In this, feudal ownership differed from allodial, where the ultimate property in the soil and the right to its profits met in the same person. It is unnecessary to add anything more to what has been already said of this fundamental element of the feud.

§ 449. 2. The feudal law and feudal tenures pertained only to land. It can be easily seen from the very nature of the relation between lord and vassal, and the peculiar character of the tenure, that personal property could not with any propriety be made the subject of these relations. Personal property is too transitory in its nature, too much con-

sumed in the using, to be the sign of the permanent tie between the superior lord and his tenants. In addition to this consideration was the fact that movable property, in the flourishing times of the feudal system, formed but an insignificant part of the general wealth, and had attained none of the importance which it has reached in modern times.

§ 450. 3. The third essential feature was the relation between the lord and his vassal. Of the general nature of this mutual relation and the means by which it was strengthened, I have already spoken. I have only to add, 1st. The services to be rendered by the vassal were, in the purity of feuds, entirely military. They were, therefore, necessarily uncertain, and varied according to the circumstances and fortunes of the superior. The vassal must not betray his lord's secret, nor conceal from him the evil designs of others; he must not violate the honor of his family, or injure his person or fortunes; he must attend him in his wars with an amount of military aid proportioned to the quantity of land held by him as a vassal; he must attend his lord's courts, of which I shall speak more in the sequel. When his lord was in danger, he must do all in his power to rescue him; and should he be taken prisoner, he must ransom him, or offer himself in his stead. Uncertain as was the amount of military service required from the vassal, there was still some limit upon its extent. It was generally understood that the holder of a knight's fee was bound to accompany his lord at least forty days in each year, if required, with horse and arms. Of course the great vassals of the crown, holding possessions of immense extent, would be forced to bring into the field quite an array, armed and equipped for war. How much constituted a knight's fee is not accurately determined. It doubtless varied in different localities with the productions and value of the soil. A holder of half a knight's fee must furnish service for twenty days. A failure to respond to the requirements of the lord in this respect, in

strictness would forfeit the fief, but a practice of inflicting fines instead soon grew up, and became common in England under the name of escuage. In the progress of time, as society became more and more settled, and the impromptu forces furnished by feudal vassals gave place to regular and constant armies of hired forces, the military service began to be changed into the more certain, and then more satisfactory compensation, of money paid as rent. But this marked the decline of the system, and was not at all consistent with its distinctive principles. I shall recur to this change hereafter, when treating at length of the tenures to real property, which were in England the outgrowth and fruits of feudalism. On the part of the lord the duty was that of protecting the vassal in the possession of his land, and of defending his person from their common enemies, and of furnishing opportunities and means of justice in baronial courts. 2d. Another feature was introduced into the relation between lord and vassal by the practice of subinfeudation. Of this I have already spoken sufficiently. 3d. The relation was territorial, not merely personal. The condition of a vassal could not exist without a fief as the basis of it. There were doubtless free-born retainers and dependents of the lords and barons, who held no lands, but they occupied an uncertain position, and were continually sinking into the ranks of laborers. The feudal allegiance seemed to be considered as something annexed to the soil, and was due as a condition of holding the fief. The doctrine of a general national allegiance was not known during the flourishing age of the feudal system, but the peculiar territorial tie ran through the whole body politic, binding each person to his immediate superior, and so all, as dependants of the highest lords, to the king. Of course an allegiance so distributed, and filtered, as it were, through so many different strata of society, was very much weakened, before it reached the nominal head of the nation.

§ 451. 4th. The relation was accompanied with the right

in the lord of administering justice throughout his territory, in his private court. Before the firm establishment of the feudal policy in England and France, the courts were local and representative, but with the increasing power of the system, and especially the growth of authority which the practice of subinfeudation gave to the greater nobles, or suzerains, these local tribunals were superseded by the territorial courts of the feudal lords. It was a part of the vassal's duty to do service to his lord in his court. These possessors of fiefs were called peers of the courts of their suzerain, and the obligation rested upon them to originate their complaints in these tribunals, with a right of appeal to the king's court in disputes of a graver importance, and upon a denial of justice. In like manner those vassals who held their fiefs directly from the crown were peers of the king's court, and were bound to do suit there, that is, were impelled by the force of their oath of fealty and pledge of homage, to resort there and answer when complained against, to make their complaints there, and to render the assistance of their counsel and judgment when called upon. These baronial courts had a jurisdiction coextensive with the territory held by the lord, and took cognizance of all matters arising among the vassals and feudal tenants. The lord himself did not universally sit as judge, and, indeed, it grew to be an uniform custom and regulation that the judicial power must be exercised by a deputy or bailiff of the lord, who should hold courts in his name. He must also, in his deliberations, consult with the lord's vassals, or peers of the court who attended its sittings, or at least with the wisest and most prudent of them, and rely much upon their aid in rendering decisions.

§ 452. 5th. Another most important element in this relation was, that neither the tenant could alien or sell his fief, nor the lord his seigneury, without the consent of the other. This was the rule when feuds were preserved in their purity, and its reasons were entirely feudal and mili

tary. If the tenant sold his fief, he substituted another person in his place liable to do his duty to the lord, a person bound by the same feudal compact. It was absolutely necessary, then, that the lord should have a negative upon such an act of substitution. As he leaned upon his vassals for his entire military force, as in them he found his supporters and retainers, so it was to the last degree important that he should know them all to be faithful and devoted to his person and interests. This regulation gave him the proper check, and assured him of the loyalty of his tenants, by forbidding any from being thrust upon him without his knowledge, by the act of a vassal.

Reciprocally the vassal could not be required to accept over him a superior, unknown, and perhaps hostile, by the act of his former and legitimate lord. The contract was a mutual one, and the yielding homage and doing fealty had been voluntary and personal, that is, directed to one person, and in him of course to his family, and could not be shifted to a stranger without consent. Thus, by purely feudal principles grew this remarkable rule of law, tying up the land of the kingdom, setting it apart from the general wealth of the realm, isolating it, refusing it as a means of exchange, rejecting it from trade and commerce, and thus hindering the advance of these means and instruments of material comfort and progress. We still discover the traces of this purely feudal policy, in the laws of the present age.

§ 453. These are the essential features of the feud. In addition thereto, there were some other general characteristics, which obtained while the system was in its ascendancy as a purely military institution. Feuds should be granted without price, that is, upon the sole consideration of the military services reserved and stipulated by the contract between lord and vassal. While the tie between them was so peculiar, partly territorial, and still largely partaking of the personal trust reposed by each in the other, it would be contrary to the whole theory of the system, that fiefs should

be sold by the lord to any tenant who was willing to pay a price demanded. Again, they should only be granted to persons duly qualified, that is, of the sex, age, and ability to render military service. So it was not in accordance with the spirit of the institution to bestow a fief upon a religious person or house, who would be debarred by their profession, or to a woman, who would be prevented by her sex, from fulfilling their part of the mutual compact. That this provision of the law, in its simplicity, was soon and generally broken, is manifest. It was contrary to its spirit, that, upon the death of a vassal, the fief should be inherited by a female heir, but this was early permitted, although the law of primogeniture undoubtedly grew up from a strict observance of the rule. Religious persons and houses were allowed to hold land of superior lords, they supplying the requisite amount of military service by hired mercenaries, or from among their own sub-feudatories. Again, the service rendered by the vassal should not be fixed as to time or manner. Even though the amount of forty days per year for each knight's fee were determined, the particular times and manners were left uncertain.

§ 454. These were all the marks of a true *proper* feud. Its foundation and animating spirit were military; its mutual relation between lord and vassal was honorable; its services were uncertain, and such as could be performed by persons of gentle birth. By deviations from these regulations, there grew up a class of improper feuds, in which the vassals were not capable of rendering military service; or the service was made certain in amount, manner, and time, or even changed from a personal and military assistance, into the paying of a stipulated rent in money, or produce; or the service was dishonorable, consisting of labor in actual tilling the soil, or performing other menial offices for the superior. As the purely military and proper feuds were gradually transformed into the class of improper feuds, by the change in the condition of society, I shall speak of them

at length, when I describe the various tenures of land, which in England grew out from the feudal system.

§ 455. There were certain important incidents connected with the pure feudal relation of lord and vassal, and the military tenure of lands. Some of these were common in all countries where the system prevailed, and others appear to have been principally confined to England, having been borrowed there from the customs of Normandy, with the Norman invasion. Those which were coextensive with the law of feuds, were escheats, aids, primer seizin, and fines for alienation.

1. *Escheats* were the natural and necessary consequence of the feudal idea, and the tenure by which land was held. When feuds became generally inheritable, so that, upon the death of an ancestor, they would descend to his heirs generally, or to such particular heirs as should be designated by the terms of the original donation, it would not unfrequently happen, that upon the death of a tenant there would be no living heir to whom the inheritance could descend. In such case the fief would return to the lord; he, having the *dominium directum*, would resume the possession, or *dominium utile*, and could grant the soil to some new tenant. This return of the fief to the lord, was called escheat. One other state of facts would produce the same result. This was such a crime or disloyal act of the vassal as amounted to a breach and termination of the feudal relation. The tenant was then in the same condition as though he were dead without heirs. The land was forfeited; he must yield up his possession, and his heirs had no claim, for the condition upon which the land was holden had been broken. It is easy to perceive that we find here the origin of that provision of the English law, which forfeits all the estate of a subject attainted of treason, and renders his blood, in the technical language of law writers, corrupt, so that no heirs can inherit property, when they must trace their title through him. Hard as this rule seems to be upon the un-

offending children of a guilty traitor, we can see that it was adopted from no such consideration as that of deterring the parent from crime by the terrible result which must follow upon his offspring, but that it has a purely historic origin, not connected at all with the policy of the present age, but referable solely to the ancient relation between lord and vassal. Our American constitution, as it proposed to cut us off in a measure from our close union with the past, and particularly rejected the principal features of the English government and polity and jurisprudence which are most directly derived from the feudal system, was consistent in abolishing this provision of forfeiture for treason and corruption of blood. The individual American states still retain the escheat of lands to the state upon an absolute failure of heirs to inherit upon the death of the last owner. But this operation of the law, though named escheat, is not the feudal escheat. It is simply an exercise of the supreme power of the collective nationality to take possession of lands for the benefit of the whole body politic, when there is no particular individual who can claim as owner, and thus to rescue the land from disuse and waste.

§ 456. 2. *Aids.* These were contributions of money from the vassals, to relieve certain pressing necessities of their lords. They were at first doubtless mere free-will offerings, but grew to be claimed by the superiors as matters of right. These aids were primarily and justly for three purposes only: for ransoming the lord's person, when he was taken prisoner, for bearing the expense of making the lord's eldest son a knight, and for furnishing a marriage portion to the lord's eldest daughter.

Besides these, the lords began to claim sums of money from their vassals for various other purposes, such as for paying their own debts, or for paying aids which had been demanded by their own suzerain; and thus these contributions came to be the means of great injustice and oppression. To remedy these evils, Magna Charta abolished all

aids but the first three mentioned, and prevented the king from levying any upon his immediate vassals, except by consent of parliament.

§ 457. 3. *Reliefs.* At the first stages of the growth of feuds, it is certain that fiefs were generally granted for life, so that they did not as a matter of course descend to the vassal's heirs upon his death. To insure the renewal of the grant to the heir, and as a condition thereof, a sum of money was generally required by the lord from his new tenant. After fiefs became universally inheritable, the same contributions were demanded by the lord from the heir upon whom, if of full age, the land descended at the ancestor's death. These assessments were called reliefs. They were reliefs to the empty coffers of the lord, but were great burdens upon the incoming heir, for while the amounts to be paid were entirely arbitrary, at the discretion of the lord, they might result in the virtual disinheritance of the heir, or at least a very serious charge upon the estate. At length, by the operation of a charter of Henry I. and a statute of Henry II., reliefs were fixed at the sum of 100 shillings for each knight's fee.

§ 458. 4. *Primer Seizin.* This was a burden which rested only upon the immediate tenants of the crown. It consisted of a claim which the king had, upon the death of a tenant, if the heir was of full age, to take one year's profits of the fief, in addition to the relief mentioned in the last section. The practice grew out of a right of the crown, upon the death of its tenant, to take and hold possession of the land, until the heir should make claim, and unless this was done within a year and a day, the fief was forfeited. This original right changed into a demand from the heir of the actual profits for the first year. The term primer seizin, or first seizin, indicates the origin of the custom.

§ 459. 5. *Fines upon Alienation.* It has already been stated that by the law of pure feuds, the lord could not alien his seignory, nor the tenant his fief, without the consent of the other. To obtain such a consent from the lord,

for the tenant to alien, it would be natural for him to demand a pecuniary contribution. Hence arose fines, payable by a tenant to the lord, upon the conveyance of his fief. In England this restriction upon the right of the tenant was removed by Magna Charta, and by the celebrated statute called the "Statute of quia emptores," passed in the 18th year of Edward I. This restriction, and the incident fines, were still retained upon the immediate tenants of the king.

§ 460. The foregoing incidents of the feudal relation seem to have been common, with various modifications, over the whole of Europe, and seem also to have been legitimate fruits of the compact between lord and vassal. The other incidents, which were almost confined to England and Normandy, were much more onerous, oppressive, and arbitrary. They were wardship and marriage.

6. *Wardship.* Upon the death of a tenant, leaving an heir, if a son under twenty-one years of age, or a daughter less than fourteen, the lord, as guardian of the heir, had the right to the possession of the fief, and the use of the land and profits as his own, until the son had arrived at his majority, or the daughter at the age of sixteen, and also the custody of the infant's person. The law supposed that the son was unable to do military service to his lord before he was of age, and that the daughter was unfit to marry until she was fourteen, and if the wardship commenced over her, it was arbitrarily extended the additional two years. Upon the arrival of the male heir at the age of twenty-one, before he could demand and receive possession of his lands, he must pay a fine of one half a year's profits of the fief, and if he were a tenant of the crown, he must be knighted or pay another fine.

§ 461. 7. *Marriage.* The lord had the further right of disposing his infant female ward in marriage, provided that he offered her a match not inferior to her in rank. In this he need not consult the ward's inclinations or wishes, but could

arbitrarily thrust upon her any person whom he chose, with the single limitation above stated. Upon the refusal of the ward to accept the person proposed for a husband, a fine was payable to the lord, of such an amount as the marriage would in good faith be estimated to be worth. Should the ward marry without consent of the guardian, the fine was doubled. That the lord should have a control over the marriage of his female tenant seems to be in strict accordance with the idea of the feudal relation, or else the ward might marry a person hostile to her superior, and thus introduce an enemy into the close personal relationship of a vassal. But the bargaining and selling the infant for arbitrary amounts of money, the power to present to her the alternative of a distasteful alliance or a ruinous fine, was one of the most oppressive features of the system in England, and could have been nothing but a mere usurpation upon the part of the lords, which ripened into a legal right.

§ 462. It is evident that these several legal demands upon the tenant, and especially those which were forced from the infant heir before he could receive his fief and be discharged from all the obligations pertaining to his minority, were terrible burdens to be borne by the landed proprietors of the kingdom. The legitimate power in the hands of the lords was immense, and it was of such a character, and they were so related to their vassals, that every opportunity was afforded for unwarrantable abuse of the right. In fact, the nation groaned under the weight of these feudal burdens, but they were only abolished by statute in the reign of Charles II.

§ 463. In the description now given of a pure feud and its incidents, it must not be supposed that in England the vassals continued to render their uncertain military service to the lords, down to the time of Charles II. Indeed, this legitimate feature of the system had been obliterated generations before, and had commenced to disappear before Magna Charta. The actual attendance of the vassals upon their

lords in their military expeditions began early to be replaced, either by mercenary substitutes, or by the payment of pecuniary fines, in the nature of compositions for the breach of duty. This change of the actual service into a pecuniary mulct, grew to be very common, and at length universal, and was called escuage. The alteration was beneficial to the kings, for it enabled them to hire an army which would be much more permanent, and therefore more effective, than the shifting forces furnished by the purely feudal relation. Magna Charta provides that escuages should only be levied by the king with consent of Parliament, which shows that although chivalry was then in its most flourishing condition in England, the canker was eating deep into the heart of the feudal system. | We should carefully guard against the error of supposing that, by the introduction of escuages, the military service was changed into fixed and certain rent for each tenant. The military tenure still remained in name, and in all its incidents and characteristics; and the various burdens of aids, reliefs, etc., which I have described, were continued in their extreme vigor, after the general disappearance of actual military service and the universal prevalence of the escuage. These assessments, like the duties which they replaced, were characterized by uncertainty in time and quantity. If they had been reduced to a fixed annual sum, in the nature of a determinate rent, the whole tenure would have been altered, and would have become what was denominated free soccage, of which I shall soon speak at large.

§ 464. Under William the Norman and his successors, the feudal system was completely extended over England; all laws regulating the ownership of land, and all kinds and methods of proprietorship, must naturally feel the influence of the ancient institution. The law of feuds did not, however, very long preserve its purity and strictness. Other kinds of ownership arose, not marked by the hardships of the military tenure. The relation, however, of lord and

vassal, or superior and tenant, was preserved, and is still maintained in England. All lands in England, not immediately in the use and occupancy of the crown, were, and still continue to be, held of some superior lord, and through him of the king. Hence the generic legal name for lands is tenement, or something holden; the person who has the useful ownership is a tenant; and the manner or condition by which the ownership is exercised and upon which it is based, is a tenure. Those tenants directly below the king, who held their lands from the crown, were called tenants *in capite*, and as they granted out portions of their property, they became in turn lords, and the subdivision was carried on through a long descending line. It is important not to confound this strictly feudal use of the word tenant with the same word as constantly employed by us in the ordinary transactions of life. Our tenants have the use of lands, generally for a short time, at a fixed compensation, all of which is regulated by an instrument called a lease. The feudal tenant was to all useful intents the owner of the land. When he died, the property descended to his heirs; he could, after a while, sell or mortgage it, or devise it by will; he treated it as his own, although behind him was the constant presence of his lord, requiring such return or compensation, from year to year, through long generations, as the nature of the tenure should prescribe. Strictly allodial land is not held by any tenure, for the ownership is absolute, not derived from a superior, so that there is no holding. In England allodial land does not exist, tenures are universal. In America all lands are allodial, except some small amount in New York, where a remnant of the feudal tenures still exists. It is sufficiently evident that all tenures are of a feudal origin, for the separation of the ultimate and useful ownerships is peculiar to the law of feuds.

§ 465. The actual tenures which sprang from the feudal system were divided into two grand classes, according to the nature of the services or compensation which lay at the basis

of the mutual compact, and by which the right of the tenant to the land was supported. These were free, and base; or those which could be held and enjoyed by all persons in the condition of freedom, and those whose services were of such a character, that, according to the sentiment of the times, they could only be performed by serfs and villains. Examples of services which supported a free tenure may be seen in the military attendance demanded from the vassal in a pure feud; and in the uncertain escuages or assessments upon him, which took the place of an actual appearance in arms; and in certain other acts of a military and personal character which were not considered dishonorable by even the highest nobility, such as carrying the king's sword and the like; and in other formal acts, which had no significance, except as they kept unbroken the theory of the feudal law, as the annual presentation to the king of a bow, or a flag, which is the service by which the princely estate of Blenheim is held from the crown in England; and finally, in the annual payment of a certain sum of money or other property of value, like wheat, cattle, or wine, in the nature of rent. The services peculiar to base tenures were those that demanded the manual labor of the tenant, as ploughing, hedging, ditching, and the like, for the lord.

Tenures were also separated by a line crossing the other division into two other classes; those whose services were uncertain in amount and time, and those whose services were fixed, definite and certain in both particulars.

§ 466. The combination of these divisions produced the several kinds of English tenures, viz.: 1st. The purely feudal tenure already described, where the services were free and honorable, but uncertain, and were afterwards commuted into indeterminate escuages.

§ 467. 2d. The Free Soccage. This is important, because now almost all land in England is held by it. Its peculiar characteristic is that the services are fixed and certain and not military, although classed among those fit for free men,

such as the payment of a certain annual rent in money or products of the soil. It is probable that the free soccage tenure is a remnant of the Saxon institutions preserved through the general imposition of the strict feuds by the Normans. At first, after the revolution following the conquest was accomplished, the amount of land thus held was small, and the proprietors insignificant, and the duties of the tenants were probably more of a mere servile kind; but in the progress of the ages, as the burdens of military tenures became more onerous and offensive, the advantages of the tenure by free soccage were gradually admitted, even by lords and vassals who had despised the free but humble soccager. Thus there was a gradual change from one species to the other. The substitution of escuages for actual military services would hasten and aid this transformation, for they differed not at all in principle, but only in the regularity and certainty with which they were paid. Finally, in the twelfth year of Charles II., all military tenures and their incidents were swept away by one act of Parliament, and the tenure by free soccage was substituted in their place.

§ 468. The derivation of the term soccage has given rise to some dispute. The generally accepted etymology is that the primitive word is the Latin *socca* or *soccus*, a plough, because the original services rendered by the socmen were of a servile and rustic character; in short, that this class of tenants were the primitive tillers of the soil. Sir William Blackstone adopts and warmly advocates another etymology, namely, that the radical word is the Saxon soc, free. He bases the opinion on the great immunities enjoyed by holders of this description. He argues that if this species of tenure had so low an origin, it would never have attained so much consideration, and reached a position so preferable to all others. Still the weight of the historical argument is entirely with the other derivation. The oldest writers and records speak of socmen as distinguished from the milites; regard them as inferior in every respect; compare and class

them with villains, and the French roturiers. They were probably at first in the same social condition as the Roman coloni, and perhaps among the remnants of these Roman laborers in Britain, we shall find the origin of the feudal soccagers. It was the insignificance of the old tenants in soccage that preserved them from the exactions of the feudal lords, and not any idea of freedom or privilege connected with their condition. The subject Saxons were not likely to be the recipients of any special favor from their conquerors, which should distinguish them above the knights and barons.

The tenures in soccage were subject to some of the same duties and restrictions which belonged to those of a military character. The tenants must swear fealty to their lord; they were liable for the same aids, for reliefs on the heir's succeeding to his estate, to primer seizin, to fines for alienation, and to escheats. Wardship and marriage of an infant heir to land held in soccage did not however belong to the lord.

§ 469. 3d. The third general species of tenure was that of villanage, in which the services were of a base and servile character. This was divided into pure villanage, in which the tenant was bound to do whatsoever the lord might demand, the service being thus uncertain as well as base, and villain soccage, in which the tenant was compelled to do only a definite and certain amount of labor for his lord.

§ 470. Before enlarging upon this species of tenure, I will briefly describe the condition and status of the class or order of villains under the feudal system in England, and throughout Europe. I commence this account by a picture of actual life, during the maturity and vigor of the system, and introduce a passage from Guizot's History of Civilization in Europe. "We will visit the possessor of a fief in his lonely domain, we will see the course of life which he leads there, and the little society by which he is surrounded. Having fixed upon an elevated solitary spot, strong by nature, and which he takes care to render secure, the lordly

proprietor of the domain builds his castle. Here he settles himself, with his wife and children, and perhaps some few freemen, who, not having obtained fiefs, not having themselves become proprietors, have attached themselves to his fortunes, and continued to live with him, and form a part of his household. These are the inhabitants of the interior of the castle. At the foot of the hill on which the castle stands, we find huddled together a little population of peasants, of serfs, who cultivate the lands of the possessor of the fief. In the midst of this group of cottages, religion soon planted a church and a priest. A priest in those early days of feudalism, was generally chaplain of the lord and curate of the village, two offices which by and by became separated, and the village had its pastor dwelling by the side of his church." This sketch applies as well to England as to France. If we now add that a great baron, holding an immense amount of land, lived in princely state, with a household composed of knightly and noble retainers from among his vassals, and that his domain was parcelled out into smaller fiefs held by inferior lords, whose social and domestic picture has just been drawn, and that these in turn, as vassals of their suzerain, must attend him with military service in his wars, and that the actual tilling of the soil, as well that in possession of the lords as that occupied by the base tenants, is done by the serfs or villains, we shall have a more complete description of the state of society and the actual working of the feudal system. If we add to this, that, scattered among these proprietors of lordly castles, were some other tenants, inhabiting humbler mansions, not surrounded by such military state, not going out with their fellows upon their lord's expeditions, but paying an annual rent, and contenting themselves with the more peaceful occupation of managing their estates, and overseeing their serfs, and if we further add the communities, mostly of small traders and citizens, collected in towns and boroughs, situated all within some fief, and held from some baron or

other lord, our general picture of English society during the vigor of feudalism will be complete. We cannot but see, that, though humble and despised, the villains played an important part in the chain of mutual dependence. They were the broad basis upon which the rising fabric was built, until it culminated in the haughty and powerful barons and feudal monarch. They were the great and almost only producers in the aggregated communities. Still their situation, their political, social and legal status was debased to the last degree. Yet deep planted in the ethnic constitution of the nation, was a vital principle, derived from a Saxon origin, which, subdued though not destroyed by the overpowering weight of the feudal system, was finally to work out their complete enfranchisement. That principle was the presumption of law in favor of the condition of freedom, against that of villanage. The work was slow, but it was sure and perfect. I shall in another place trace the progress of this gradual development of the principle of individual liberty, until it succeeded in abolishing serfdom, and turning England and thus America into nations of freemen.

§ 471. Without attempting to discuss the origin of serfdom in general, it is sufficient to say that it seems to have been universal until quite a recent period in the history of the world, though condemned by all standard writers, except by a small school of recent apologists in our own country, as contrary to natural law. The Saxons possessed theows before the Norman conquest; the institution prevailed co-extensive with feudalism; and it is familiar to all, that the most ardent Greek and Roman patriots held the right of life and limb and property over their slaves. The villains in England, during the domination of the feudal system, were probably partly the descendants of the ancient Britons, enslaved by their Saxon conquerors, and partly the lower and poorer classes of Saxons, reduced to servitude in turn by their Norman masters. Their personal status was double. In respect to their lords, or really owners, they had almost

no rights. The exceptions were, that the lord might not kill or maim them, or commit a rape upon the females. Should their masters be guilty of the latter acts of violence, they were punished at the suit of the king, but not of the villain. In respect to all other persons, however, villains were absolutely free, with all the rights and privileges of freemen. They could acquire, hold, or possess no property of any description as against their lord; whatever they should obtain in any way, he might seize and enjoy. They could maintain no suit against him, except a proceeding in the nature of a prosecution of murder for the killing of an ancestor; they were obliged to perform whatever menial offices and labors he might demand. Yet in this their low estate, they were supported by a simple principle of the law, making presumptions in favor of liberty, which eagerly grasped at every opportunity for their enfranchisement, and which thus distinguished them by a strong contrast from the condition of African slavery in this country, where, by the several State laws in which the institution exists, and by the national legislation, all the legal presumptions are against the slave, and in favor of the master. Villains were of two classes, regardant, and in gross. Those called regardant were annexed to the soil, as it were, belonging to it, and passed with it when it was conveyed, or when it was inherited. In this they resembled the condition of the Russian serfs, before they were enfranchised by the present reigning emperor. Villains in gross were not considered as attendant upon a manor, or fief; they were not fixtures upon the land, but were annexed to the person of the lord, to be disposed of by him at will. These latter were very few in number.

§ 472. Whatever land a villain had it is plain he held entirely at the caprice or will of his lord, who might dispossess him at pleasure. The amount of land thus held by each villain was small, sufficient for a cottage and ground to support his family. The services rendered were done

upon the domain of the master, and consisted in digging, ploughing, manuring, cutting wood, hedging, ditching, and such like servile duties. Those humble laborers were gathered together in small villages within the manor, whence their name, from the Latin *villa*.

§ 473. Tenure by villanage has long since disappeared in England, and has there been succeeded by a species of ownership, which has no counterpart or analogy in the United States, called copyhold tenure. The copyhold tenants are the political successors of the ancient villains, but the entirely arbitrary right of the lord has departed, and the simple possession of the tenant at the will of his superior has strengthened into a strict right, depending upon the immemorial usages of the manor to which they belong. Copyhold tenure is still a part of the English law, but as it is entirely unknown with us, it will not be necessary to describe it more particularly.

§ 474. Having thus sketched the positive institutions affecting the law of real property and the status of the individual, which were a part of the feudal system, and which existed during its maturity and vigor, I shall now proceed to show how the English and American law has since been affected by this cause, and to point out some of the principal features, which, from a feudal origin, are still impressed upon our jurisprudence.

We should naturally suppose that the influence of the feudal system upon succeeding ages would be great, even after feudalism in its integrity had disappeared. Institutions so marked in their character, so deeply affecting all classes of society, penetrating so intimately, not only through the public life, but into the very private and home life of a people, must make a deep impression upon their manners, customs, and legislation, which a long lapse of years only can entirely obliterate. Peoples do not change in a single generation. The outward institutions, the forms of government, the executive and administrative functions,

may be revolutionized by some sudden outbreak, some momentary shock and jar of the body politic, but the real life of the nation will still flow on in a steady stream. It is the work of generations and centuries to alter the laws of a country. So, in examining the effects of the feudal system, we shall fail to discover any sharply defined line, distinguishing an epoch when the law of feuds prevailed, and a time when it had ceased. The statute of Charles II. in England, abolishing, by one act of the legislative will, the whole mass of military tenures and their harsh incidents, was but a blow cutting off a decayed and almost lifeless limb. Yet the vitality had only deserted this branch, to invigorate other offshoots, which have continued to bear their fruit into our times, and in our laws.

§ 475. The grand and marked feature which distinguished the law of feuds from the Roman law has already been adverted to. It was that preference which it gave to landed over personal property; the two separate and unlike codes which it established in regard to possession and property in movables and in immovables. There is certainly no reason in the nature of things for this strong distinction, no reason why such immunities should have been enjoyed by the owners of land. The mere fact that the soil cannot be moved, cannot be changed from place to place, is not such an inherent difference of character as would demand a peculiar and dissimilar set of legal rules for its management from those which would suffice for goods and chattels. It is plain to see that the distinction of which we are speaking is founded entirely in the law of feuds, and in the notions which have sprung up from that system of policy. The Roman law knew no such contrast; it treated all kinds of property in the same manner; it regulated them by the same code; it impressed upon them the same rights and obligations; and this ancient system, after being crushed down by the barbarian invasions, existing only in close contact and admixture with barbarian laws and customs, has

by the force of its inherent power, its truth to nature, arisen from its low condition, and once again regained its supremacy throughout Europe.

§ 476. The preference given by the feudal law to lands over chattels has affected the general jurisprudence of England and America in various important particulars. The chief of these I will now proceed briefly to state.

1. The Difference in their Ownership. The feudal system, as we have seen, introduced the method of tenures, or the fact that one person held his land from another, who never parted with the entire ownership and dominion over it. This was the peculiar feature of the law of feuds, and the principle yet prevails under one form or another in England, although it has been abandoned in the United States. On the contrary, feudalism did not interfere with the natural property in movables; over them the ownership was absolute. The feudal law made but little account of this species of wealth. All values were centred in land. With the rise and increased power of free cities, and especially the maritime towns, personal property received more consideration; the law of ownership, traffic, and commerce became more involved, more suited to the wants of a steadily increasing trade. But all this was opposed to the spirit of feudalism and largely contributed to its overthrow. During the vigor of the system, while the relation of lord and vassal was sharply defined, while the gradations of subinfeudation were unbroken from the king and great suzerains down through the series of mesne lords to the humble soccagers and debased villains who tilled the soil, all handicraft was rude and despised; goods, chattels, and all descriptions of personal property were simple and mean; horses for war and for beasts of burden were the most prized of domestic animals; the masses of population were scattered through the country, separated from each other by considerable intervals, and grouped about the castles and manorial residences of the land owners; the cultivation of the soil was

extremely imperfect and unproductive. Thus the law of feuds passed by the property in movables as something of too trifling importance, too insignificant to merit attention. It left it where natural right places it, and as the Roman law regarded it as well as property in lands. The change in the estimation and value, which European law, after the overthrow of the empire and the imposition of the barbarian rule, placed upon movables, began, as has been said, with the rise of the free maritime cities. Of these cities, and their codes of commercial and maritime law, and the enduring additions which they made to the general jurisprudence of Europe, I shall speak more at length in another place. From this commencement the once despised chattel has risen in importance, has asserted its superiority in some sense to the fixed soil, and has attained a value and consideration equal to or greater than its former rival. The labors of courts are now almost solely directed to questions involved in the law of personal property; the provisions of statutes are now almost entirely occupied with the same subject. The law of real property has fallen into the background, while commerce and trade and manufactures furnish the great material for legal controversy and decision.

§ 477. 2. Their Sale and Alienation. As the law of feuds left the absolute dominion in the owner of personal property, so it permitted in him the free right of transfer and sale. Such sales could be made with the utmost informality, requiring at least only a delivery or change of possession between the vendor and vendee, accompanied by a verbal contract, and perhaps simply demanding the agreement. As the disparity between the two species of property diminished, and chattels rose in value, and trade increased, it became necessary to throw some guards about the too free transfer of movables. Hence was enacted the celebrated Statute of Frauds, in the reign of Charles II., which has been pronounced to be simply declaratory of the English common law, and not to introduce any new principles.

This statute requires that a sale of chattels of a certain small amount in value, must be evidenced by a memorandum in writing, or by a delivery or partial delivery, or by a payment or partial payment of the purchase money. This statute is in substance the law in all the American States.

§ 478. Alienation of lands was placed by the law of feuds in a far different position, and far different also from that under the Roman law. We have already seen that in its simplicity the feud placed an almost absolute barrier in the way of the transfer of a fief. The genius of the system was opposed to a change of proprietors. The isolation of the lords cut up the state into petty communities, not tribes or clans, for there was no family tie; and these communities remained unbroken by accessions from abroad, or desertions from within. So the descent of lands from father to son was favored; its alienation from the line of the original donor was strongly resisted. By-and-by the strong restriction upon the power of a proprietor to transfer his fee was broken in upon; tenants were permitted to mortgage and alien, but still subjected to the payment of fine to the lord as a consideration for his permission. This privilege was granted by statute in England during the reigns of Henry I. and Henry II.

§ 479. Certain means of restricting the power of alienation were introduced upon private considerations, for the gratification of private feelings. Such were the practices of entailing a fief, that is granting land to a person and to particular heirs, as the heirs of his body or direct descendants, or to a person and his eldest son in a perpetual line, thus introducing the principle of primogeniture. This species of donation was held to cut off the power of any particular tenant to convey his property absolutely either by deed or will, and thus to deprive the expectant heir of his anticipated rights. I do not, however, think that the law of entails has any direct connection with the feudal system

otherwise than as it was based upon, and presupposes the general principles of, inheritance which were the immediate outgrowth of that system. Nor do I think that the intricate divisions of estates, or the various quantities and amounts of interest in a particular portion of land, which might be owned by different persons at the same time, had any necessary connection with the spirit of feudalism, as the natural and inevitable development from that spirit. Tenures are such a natural and inevitable product. We cannot conceive of feudalism existing without the law of tenures growing out of it. It was the subtlety of lawyers, and the natural desire of men to hold a guiding hand, as it were, over their possessions after death, which introduced these manifold divisions of estates for years, estates for life, estates in fee simple and conditional, estates in possession, and estates to come into possession at some future time, and estates which perhaps might never come into possession at all. But of these more in particular hereafter.

§ 480. The feudal restrictions upon the power of a proprietor to dispose of his fief, were more carefully preserved in reference to that kind of alienation which is accomplished by the act of the law, contrary to the will of the party himself, and for the purpose of satisfying his debts. Although the spirit of the feud was so far mitigated as to permit the owner voluntarily to part with his landed property, or to mortgage it, and thus incur the hazard of losing its possession entirely, it long and strenuously resisted any attempt of a general or judgment creditor to seize and sell it. Indeed, so careful was the feudal spirit to preserve the land and personal services of the tenant for the use of the lord, that originally a creditor could neither take the land, nor the person of his debtor, but must satisfy himself with the goods and chattels. But as early as the reign of Edward I. the law was altered by statute, and in case of insufficiency of personal property, the creditor was allowed to take one half of the debtor's lands, until he had satisfied his demand from their

profits. Shortly after, merchant creditors were permitted to take all the real property of a debtor for a similar purpose, and in the reign of Henry VIII., the right was extended to all classes of creditors. Later English statutes have greatly enlarged this right, and have rendered a debtor's land much more liable to be seized and used, or sold in payment of debts.

§ 481. In America, the restrictions of the feudal system upon the free alienation of lands have never existed to a great extent. The first English settlers of the colonies, especially at the north, leaving the mother country at a time when soccage tenures had almost entirely displaced the pure feud, and coming from the ranks of society which had most sorely felt the weight of the feudal bonds, had every reason to secure to themselves and their descendants an immunity from these burdens. Still, as our law is directly derived from the English, we have not escaped the traces of the restrictive influence. With us alienation is perfectly free, because lands are allodial; but the involuntary alienation, or the seizure and sale of real property for the debts of the owner, yet shows the old preference of the law for lands over chattels. By the American law, a judgment creditor must first endeavor to satisfy his execution out from the personal property, before he can have recourse to the soil. It may be true that this seems to be a natural and just provision, that it is equitable to deprive a debtor first of his movable goods and products of the soil, before we strip him of the very property out of which other products and chattels can be raised; it may be true also that the Roman law demanded of the creditor the same discrimination, but it is no less true that we derive the distinction by direct descent from the old spirit and rules of the law of feuds.

§ 482. 3. Inheritance and Succession. The rules for the descent and inheritance of lands introduced by the feudal system were very peculiar, and still continue in marked

contrast with those which obtained under the Roman law. Every system of jurisprudence provides for some disposition of the effects of a deceased person, but in the details of the succession there is an endless variation in different nations. The laws of succession in Europe and America may, however, be correctly classed in two groups; those which derive their spirit from the legislation of Rome, and those which are rather allied to the system of feuds. In those countries where feudalism has largely deposited its fruits in the mass of national customs, we shall find the marked contrast between the succession of movables, and the inheritance of lands. The one partake of the Roman, the other of the barbarian spirit. By the Roman law, as all property was treated in the same manner, the succession of both real and personal was regulated by the same rules. By the feudal law, land only is inherited by the heir; he takes no right to or property in the goods and chattels in his capacity as heir. By the Roman law, any person might appoint an heir, and in default of such appointment, the law made the designation. The heir thus chosen succeeded to all the property of the deceased, of every description, whether real or personal, and at the same time was charged with all of the deceased's obligations and debts, which he was compelled to discharge, even if they were greater than the value which fell to him in the succession. The law thus, in theory, continued the person of the deceased in the person of the heir. These two principles, that the heir was designated by the deceased, and was a prolongation of, or successor to, his existence, were the distinguishing features of the Roman legislation. By it an estate did not necessarily descend, in our acceptation of the term, from ancestor to heir, but the ancestor, by his own act, pointed out some individual, whether his son or another person, who was, in theory, to continue his life and being, and receive his property, and perform his duties The heir was *eadem persona cum defuncto.* This practice of casting unknown obligations upon

a stranger, and compelling him to discharge them, whether or not he received sufficient property, was certainly attended with hardship and injustice. The rule was relaxed, by allowing the heir a certain time to deliberate, to inquire into the condition and amount of the estate which had fallen to him, before he determined to accept the succession, but he must, within the time, either accept absolutely or refuse absolutely. Further progress and later legislation removed all hazard, by giving to the nominated heir what was called the benefit of an inventory, that is, a schedule and valuation of the property of the deceased was made, and the heir was only held accountable for debts equal to the total amount of the inventory.

§ 483. We can see in these provisions exactly the condition of administrators by the law of England and America, with the exception that they take only the personal property of a decedent. Indeed, English jurisprudence early borrowed its rules for the succession of movables from the Roman law. Feudalism and the feudal spirit, passing by the chattel as too unimportant for its notice, left it to be administered by the ecclesiastic courts, which, in their spiritual character, assumed jurisdiction over the estates of the dead, except so far as they were debarred by the rules of the feud respecting real property; and these courts, consisting of ecclesiastics versed in the Roman law, of course drew from it their methods and maxims.

Thus there grew up side by side in England, two systems of succession, the one relating to movables, and following the laws of Rome, the other confined to land, and breathing the spirit of feudalism. Under the first system, adopted as well in America as in England, the administrator becomes owner of all the goods and chattels, the property of all kinds except real, which were left by the decedent. I say he becomes owner, not absolute indeed, for he is in a measure a trustee, but he holds the property by an absolute title, and all other persons to whom it is afterward

transmitted, whether creditors, or relatives, derive their title directly from him, and not from the deceased owner. At the same time the administrator has the benefit of an inventory, and is personally responsible for the debts of the decedent, to the amount of that appraisement. This was the Roman law of succession for all property, and is our law as to goods and chattels.

§ 484. The feudal rules of inheritance were far different By that system the ancestor had nothing to do with the appointment of an heir, nor could he prevent, or remove him from his condition. He might, after the statute of wills, devise all his unentailed lands to others, and thus deprive his successor of all beneficial interest in the property, but he remained the heir still. He was a person related in blood to the ancestor, and thus entitled to succeed, on his death, to all his immovable property. He did not represent the ancestor, he was not a prolongation of his being; he represented the first donee or recipient of the fief which had been given to the vassal or tenant and his heirs. So the particular heir to whom the land descended had no connection with his immediate ancestor, and in the theory of the law, no need of him, except as he was obliged to trace his descent through him as one of the steps up to the original and first donee of the fief. As the heir did not represent the ancestor, so he took the land from him entirely discharged and free from all debts; while receiving and enjoying the property he was not called upon to pay a farthing of indebtedness, or to perform any obligations entered into by the decedent. In this harsh rule the feudal spirit was logical, it worked on undeviatingly from its premises. The fief was originally given to the first donee to be enjoyed by him during his life, and after his death to be used by the next person in the line of blood relationship, and so on indefinitely, until heirs had failed. Each particular tenant was, during his possession, in theory only a life owner, and the expectant heir stood behind him, entitled to receive the

fief from his hands as complete as it had been received by him. It is true, the ancestor was permitted to alien or devise away the whole property, but these were innovations upon the strict logic of the feudal law.

§ 485. After alienation of lands became free, the severity of this rule exempting the land which had descended to the heir from being appropriated to the payment of the ancestor's debts was modified. It was too harsh, too manifestly opposed to common justice, for the gradually advancing spirit of enterprise to endure, and the lands first became chargeable, after a descent, with the debts of record against the deceased owner. These obligations created a specific lien upon the very land, and the heir took it subject to that lien. Afterward the law allowed debts evidenced by writings under a seal in which the heir was expressly mentioned (as if the ancestor in a bond should bind himself and his heirs to the payment of a sum of money), to be collected from the inherited estate. The reason given for this relaxation was, that the heir was supposed to have assented to the claim, and thus personally incurred a liability, by being mentioned in the written instrument.

§ 486. In America the principles of the feudal inheritance are still preserved in the legislation of nearly all the States. The land descends to the heir, a person related in blood to the ancestor, and the movables are taken by an administrator. The preference for lands, to the unjust extent of leaving them in the heir's ownership without calling upon him to pay the ancestor's debts, is not retained; still the distinction is preserved so far as to make the chattels the first fund to which a creditor must resort for the payment of all debts, but after these are exhausted, the heir must either give up his inheritance, or pay the obligations himself. In no case, however, would he be liable to more than the value of the land which descended to him.

I have here described the course which property takes only when the last owner died intestate. He has the

power, both in England and America, to alter that disposition by a last will, and to charge the land primarily with debts, or to convert it into money, or to deal with it at his pleasure.

There were some striking features of the feudal law of descent relating to the order of succession, in other words, determining who was the heir in all cases. These rules, or canons, are founded upon the theory that an heir was the representative and relation in blood of the original donee of the fief. But I have already sufficiently illustrated this peculiarity of the law of feuds, and need not here enter upon any critical examination or statement of the various intricate rules which grew out from this fundamental idea.

§ 487. I have thus imperfectly stated the origin, history, and nature of feuds as they assumed the character of positive laws and institutions regulating the status of individuals, and the ownership, transmission, and inheritance of real property, and some of the important principles of law which modern English and American jurisprudence has derived from this ancient origin, and have described some of the grand features which feudalism has stamped deeply into our codes. It has not been my purpose to speak here of the feudal system as an element in the general progressive civilization of Europe, or to notice its effect upon the individual or the nation, otherwise than as that effect was directly connected with the body of municipal law, which was the framework of the vast structure. I will not, however, close this chapter without a passing reference to the character of feudal civilization, which had the same general features, during its maturity, wherever the system prevailed.

§ 488. Upon the lower orders of society, the peasantry, the laborers, the traders, and artisans, there can be no question but that feudalism rested with a deadly weight. By them it was abhorred and hated with a terrible animosity

It gave them no rights, it hindered their attempts to rise above their condition, it bound their hands and checked their endeavors at progress and culture; it despised all trade, commerce, intercommunication; it was destructive of all enterprise; it isolated communities, cutting up the nations into separate groups of peoples ignorant of each other, without intercourse or sympathy; it struck a blow at the very root of nationality; it reduced the universal allegiance to the government and the laws to a vain shadow, substituting in its place the feudal allegiance of vassals to lords, and of serfs to masters; it rendered the operation of general laws throughout a kingdom a mere impossibility. How can these destructive influences and effects upon society, and especially upon the lower orders, be more plainly evidenced, than by the change which has come over the meaning of feudal terms? What volumes of hate, bitter, concentrated, and enduring, against the tyrannous system, and the dominant masters, are treasured up in the present use of the words "vassal" and "villain." Vassal was once an honorable term, gladly borne by the proudest and noblest in the nation; it has sunk into disgrace, and the seal of a people's contempt has been stamped upon it, as it now describes the bondman, the servant, the low, grovelling creature who lives upon the favor of his master. The feudal "villain" was only a laborer, poor indeed and debased in the social degree, and despised by his superiors, but honest, and the great producer from the soil. The modern villain is the person capable and guilty of all crimes of the greatest atrocity. Thus has been crystallized into our language the estimation in which the people regarded the feudal system. Nor has this hate been less plainly exhibited in France. The bloody revolution, which swept away the king, the nobles, and all the ruling orders, was but the outbreak of this long smothered fire; it was the uprising of the lower orders, the old roturiers, those down-trodden serfs, whom the iron power of feudalism had for centuries

crushed to the earth; the old Gaulic element in fierce revolt against their barbarian, Germanic masters.

§ 489. Among the upper classes, the lords and military tenants, the influence of the system was more beneficial. While it encouraged petty wars and turbulent outbreaks, by this very means, as well as by the relation of superior and vassal, it developed a spirit of self-reliance, of independence, of resistance to illegal authority. At the same time it cultivated many of the milder elements of individual character,—personal honor, devotion, loyalty, and faith. Here, too, woman rose out from a condition of partial servitude, into a position of honor and equality with man. The seclusion of the castles and mansions promoted the intercourse of the husband and father with his wife and children; the family relations were softened, and the family ties strengthened; the wife became her husband's companion, equal, and friend; love advanced from a passion to a sentiment; the poetry and other literature of the times sung and spoke of the graces, charms, and goodness of woman. We must not carry back our manners into the 11th, 12th, and 13th centuries, and expect to find the same refinement of intercourse between the sexes, for, indeed, most of the songs and poems of the troubadours and trouveurs, with which knights and ladies were amused, are too gross to be read now, except as mere curiosities; yet still it is true that under the feudal system woman was greatly advanced in her social and domestic position.

§ 490. To the general civilization, feudalism has doubtless bequeathed, although it did not originate, the germ of the idea that the people, the whole community, should interfere in pronouncing judgment between litigant parties, that is, the right of being tried by one's peers. While the centuries from the 5th to the 14th had nothing similar in form to our trial by jury, as I have shown, yet the territorial feudal courts, which were held by each suzerain, were attended by the holders of fiefs, or pares, who took a part

in the actual administration of justice between individuals.

§ 491. To the same origin we must refer the admitted modern principle of legislation, that no man is bound by laws, or obliged to pay taxes, to which he has not by implication consented. The feudal relation of lord and vassal was fixed and certain; the government was in the hands of the suzerain, and his rights and obligations, as well as those of his inferiors, were determined, and by the feudal theory he could not arbitrarily add to his own demands, or infringe upon the persons and territorial rights of his subjects. All this was doubtless often violated, force continually broke in upon the nicely adjusted fabric, but the principle was yet there, imbedded in the very foundations of the feudal system.

§ 492. This mere glance at the results of feudalism upon society, at its character as a simple civilizing agent, is sufficient for my present purpose. Its direct effects upon the lower orders were entirely evil. Among the upper classes it promoted sentiments of honor and fidelity, of independence and self-assertion; it raised woman to a higher level than she had before occupied; it confirmed the bonds of home and family; and it has left to us some invaluable principles of political organization and government. Those writers who regard only its destructive influence upon the peasantry, see in it nothing but injustice, rapine, tyranny. Those who look only at the examples of personal faith and loyalty which it furnishes, find there a nearly perfect society, in which man's highest nature was fully developed, and from which we, in modern times, with our trade and manufactures and commerce and material advancement, have sadly degenerated. How completely both of these classes of writers are in error, I think it needs no more to show.

§ 493. The causes of the abandonment and decline of the feudal system were manifold. Some of them affected it as a mere system of municipal law, others as a form of civilization and social order.

Among them we may mention the decay of the purely military spirit of the relation between lord and vassal, and the consequent change from actual service to the payment of pecuniary escuages. This greatly loosened the tie of personal attachment, dependence, and protection between the superior and the possessors of fiefs, which was the very inner life of the whole system.

Another destructive element was the gradual though slow encroachment of the Roman law. This form of jurisprudence, as we have shown, though long overshadowed and almost hidden, was never utterly destroyed, and its marvellous vitality preserved it through the centuries of feudal supremacy, until it began to act on the aggressive. Its influence was less rapidly and less thoroughly felt in England than on the Continent, yet there the Roman law has accomplished far more than English lawyers have been ever willing to admit.

A third element of decay was the growth and spreading influence of free and maritime cities, whose increasing commerce demanded and introduced codes of laws through Europe utterly foreign and antagonistic to the feudal civilization.

§ 494. But all these causes, and many more minor ones, are included in the general fact that society, in the steady progress of culture, in the slow development of ideas, in the continual onward movement from the germ toward the fruit, which marks every system of jurisprudence possessed by a people not absolutely stationary, which characterizes every civilization not effete, was growing beyond the sharply defined rules and strict relations of feudal institutions. Strong as were those ancient bonds, having the prestige of power, of authority, of position, they must one by one burst, and give way to the irresistible pressure from within the body politic. So have we seen a tree sending its trunk up through a fissure in a rock of vast size and weight. Once the slender sapling was nicely fitted in the stony jaws of

the narrow crevice, but the gentle currents of ascending sap from year to year deposited their small particles upon the body of the tree, and the natural vitality of the growing organism, even through this invisible movement, exerted a force so overwhelming, that the solid rock was rent in its place, and the noble oak stands triumphant amidst the dissevered fragments.

# CHAPTER III.

## THE ROMAN LAW.

> Tu regere imperio populos, Romane, memento:
> Hæ tibi erunt artes; pacisque imponere morem,
> Parcere subjectis, et debellare superbos.
> (ÆNEID., lib. vi., 851.)

§ 495. THE Roman law affords the most complete and instructive example of the rise, full development, decline, and death of a system of national jurisprudence. The value of the example consists in the illustration which it furnishes of the normal method of a legal growth, and also in the excellence of the legislation itself which was the final product of the maturity of the Roman organizing power. I have already, in Part I. of this work, exhibited the essential features of this development, the formative characteristics of this law, and have shown them to have been identical in principle with those of England and America.

§ 496. The object of the present chapter is to give a summary of the jurisprudence itself, so far as it affected the private rights and duties of the people. With purely political regulations I shall not interfere, except so far as may be necessary to explain the sources and character of those which governed the actions of individuals toward each other. The limits of the work do not permit me to trace the successive changes in the actual legislation through the long interval from the time when its first landmark was fixed in the XII. Tables, to the epoch when it was summed

up in the compilations of Justinian. During these centuries the municipal law, like the commonwealth itself, passed through many phases. Gibbon, in his History of the Decline and Fall of the Roman Empire, and after him Prof. Hugo, in his History of the Roman Law, divide this continuous life into four periods; the first, from the founding of Rome to the XII. Tables; the second, from the XII. Tables to the time of Cicero; the third, from Cicero to the Emperor Alexander Severus; and the fourth, from Alexander Severus to Justinian. I do not propose to follow this division in its minuteness, but to give first, a sketch of the Roman legislation in its primitive state of rudeness and arbitrariness, before the Prætors had broken down the old *lex civilis*, and built up a jurisprudence based upon principles of equity and justice; and secondly, to describe that law in its perfected state, as it emerged from the hands of legislating magistrates and enlightened jurisconsults, and has thus been handed down to us, preserved in the codification of Justinian. These may appropriately be styled the Aristocratic, and the Philosophic and Christian periods. A complete history would require that I should set forth in detail the successive stages of the progress through which the system marched, the several influences which were brought to bear upon it, and the character and labors of the principal legislators, who, from time to time, were the instruments in moulding and perfecting it. I shall, however, pass by all of this interesting detail, and content myself with some of the results alone, of this advancing civilization.

## THE ARISTOCRATIC PERIOD.

§ 497. As an introduction to a sketch of the municipal law, it is proper to give an outline of the primitive social and political organization of the Roman commonwealth. I quote the words of Dr. Arnold. "The people or citizens of Rome were divided into the three tribes of the Ramnenses,

Titienses, and Luceres. Each of these tribes was divided into ten smaller bodies called *curiæ*, so that the whole people consisted of thirty curiæ. I have said that each tribe was divided into ten curiæ; it would be more correct to say that the union of ten curiæ formed the tribe. For the state grew out of the junction of certain elements, and these were neither the tribes nor the curiæ, but the *gentes* or houses, which made up the curiæ. The first element of the whole system was the *gens*, or house, a union of several families who were bound together by the joint performance of certain religious rites. Actually when a system of houses has existed within historical memory, the several families who composed a house were not necessarily related to one another; they were not really cousins more or less distant, all descended from a common ancestor. But there is no reason to doubt that in the original idea of a house, the bond of union between its several families was truly sameness of blood. * * * * Thus the state being made up of families, and every family consisting from the earliest times of members and dependents, the original inhabitants of Rome belonged all to one of two classes; they were either members of a family, and if so, members of a house, of a *curia*, of a tribe, and so, lastly, of the state; or they were dependents on a family, and if so, their relation went no further than the immediate aggregate of the families, that is, the house; with the curia, with the tribe, and with the state, they had no connection. These members of families were the original citizens of Rome; these dependents on families were the original clients. The idea of clientship is that of a wholly private relationship; the clients were something to their respective patrons; but to the state they were nothing. But whenever states composed in this manner, of a body of houses with their clients, had been long established, there grew up, amidst or close beside them, created in most instances by conquest, a population of a very distinct kind. Strangers might come to live in the

land, or, more commonly, the inhabitants of a neighboring district might be conquered and united with their conquerors as a subject people. Now this population had no connection with the houses separately, but only with the state, composed of those houses; this was wholly a political, not a domestic relation; it united personal and private liberty, with political subjection. This inferior population possessed property, regulated their own municipal as well as domestic affairs, and as freemen fought in the armies of what was now their common country. But strictly they were not its citizens; they could not intermarry with the houses; they could not belong to the state, for they belonged to no house, and therefore to no curia and no tribe; consequently, they had no share in the state's government, nor in the state's property. Such an inferior population, free personally, but subject politically, not slaves, yet not citizens, were the original *plebs*, the commons of Rome." (Arnold's History of Rome, pp. 10, 11.)

I do not mean to speak further of the early political organization of the Roman commonwealth. I pass by the constitution and powers of the Senate, of the assemblies of the *curiæ*, of the assemblies of the *plebs* in their tribes; the character and force of the *leges* voted by the citizens and of the *plebiscites* voted by the commons. I also pass by the long and fierce contest for political power between the citizens and the commons; the increasing authority of the latter; the gradual breaking down of the restrictions upon their free voice in public affairs, and the compromise between the two orders, resulting in a revision of the constitution and of the private municipal law, and the collation of the latter in the XII. Tables. These topics are certainly of great interest, but are foreign to the design of this book.

§ 498. During these primitive times the municipal law of Rome was rude, severe, and arbitrary. It was in the strict sense of the term, *Lex Civilis*. Its origin must be found in the customs of the tribes which united to form the

Roman state. The marked genius of the Roman people for organizing had taken these tribal customs and consolidated them into a body of public institutions and private rules, which were regarded with the most profound veneration. The decemviral code of the XII. Tables was a compilation of this preëxisting legislation, and it continued as the basis of the Roman jurisprudence down to a late period of the republic.

§ 499. The general character of this legal system was marked by a wonderful severity, and opposition to all that is understood as naturally right and equitable. M. Troplong says: "The civil law of the Romans at its origin was imprinted with that theological and aristocratic rudeness inseparable from heroic epochs. It sprang from the bosom of a religious, political, and military patriarchate, who engraved on it their marks of conquest, their instincts of immobility, and the formalistic, jealous, dominating genius, nourished in the sombre school of the Etruscan theocracy. We shall search in vain in this law for that efficacious action of natural equity, and that voice of humanity which speaks so loud among civilized peoples. The simple notion of justice and injustice is yet enveloped by institutions which sacrifice nature to political necessity, innate truth to artificial laws, liberty to sacramental formulas. In the civil order, as in the state, Rome only sought to form *citizens*, and the more she yielded to them the privileges and grandeur of this eminent title, the more she demanded from each that he should make sacrifices for his country, trusting that, out of a regard for public interests, he would abdicate his affections, his will, and even his reason."

§ 500. I shall now give a brief outline of this primitive *lex civilis*, so far as it affected private rights and duties. This municipal law may be divided into four parts: I., that which relates to persons; II., that which relates to things, as the objects of the right of property; III., that which relates to obligations; IV., that which relates to actions. As

I have sufficiently explained the last of these divisions in the former part of this work, it will be omitted from this chapter.

### I. OF PERSONS.

§ 501. The law paid a careful regard to the status, or civil condition, of all persons within the commonwealth. This status had reference to the capacity of the individual to acquire and enjoy rights, and was separated into several gradations, ranging from the one in which no civil rights were enjoyed, to the one which bestowed all the privileges and immunities of the Roman citizen.

§ 502. The two grand divisions of persons were, slaves, and freemen.

1. *Of Slaves.* The Roman slaves in primitive times possessed no civil rights; they were the absolute property of the master, who held a power supreme over them, extending even to life. The slaves were either captured as enemies and reduced to servitude, or were insolvent debtors sold by their creditors, or condemned criminals, or the children of slave mothers; for the Roman law from the outset adopted the maxim *Partus sequitur ventrem*, the condition of the mother determines that of the offspring. Masters might manumit their slaves, either by a public solemn act before a magistrate, or by the provisions of a last will and testament.

§ 503. 2. *Of Freemen.* All persons not in the condition of servitude, occupied the advanced status of freemen. Freedom, however, did not confer equal civil rights upon its possessors. Freemen were either born so (ingenui), or had been manumitted from slavery (libertini.) Running through this general class was a broad line of demarcation, which separated them into citizens (cives), and strangers (peregrini.) This division was revered as of the utmost importance by the primitive law; in fact, it was only for the citizen that the civil law existed; he was bound by its arbi-

trary restraints, and enjoyed the honors it conferred; for him it contrived its unnatural family, its artificial rights of property, its sacramental forms of obligations, giving him, in return, the coveted privileges which belonged to his order.

Persons became citizens either by birth, or by being freed from slavery when the master himself possessed the right, or by adoption into the family of a citizen.

§ 504. As the strangers resident on Roman soil, and forming a portion of the commonwealth, were not included in the embrace of the purely national law (lex civilis), and took no part in civil affairs, they were left to the guidance of the *jus gentium*, or natural law, so far as it was recognized in these semi-barbarous epochs. With them the family was natural; property was acquired, held, and transferred in a simple and natural manner; obligations depended upon the good faith and intention of the parties, and not upon arbitrary forms of words.

§ 505. The citizens themselves were again separated into two classes: those acquiring and holding rights for themselves (those sui juris); and those acquiring and holding rights for another (those alieni juris.)

In treating of these distinctions, it is necessary to describe that most singular institution, the Roman family, with its immediate relations of husband and wife, father and child, and its dependent ones of kindred and tutelage, or guardianship.

§ 506. The man *sui juris*, or *paterfamilias*, was a citizen entirely independent of all others, owing duty to none but the state, who acquired and held all civil rights and all property for himself alone. All other citizens, including all females, were *alieni juris*, were subjected to the power of another. This unnatural distinction, which was the basis of the family relation, strongly characterized the primitive aristocratic ideas of the Roman law, and was tenaciously clung to for centuries of progress, nor was it entirely thrown aside until the codification of Justinian.

§ 507. The *paterfamilias*, or head of the Roman family, must be a male, and but one person could exercise his rights at the same time. His position was in some respects patriarchal. Belonging to this headship, and conferring upon it its great dignity in the estimation of the old Roman, were three remarkable and terrible capacities or powers. These were known as *potestas*, the power; *manus*, the hand; and *mancipium*.

§ 508. 1st. *Potestas.*—This was separated into the power over slaves, and the paternal power. The first of these has been sufficiently alluded to.

The paternal power of the *paterfamilias* extended over his sons and their wives and children, over his daughters until their marriage, and over his children by adoption. These were all considered as *alieni juris*. This paternal right did not cease from the age, marriage, rank, or dignity of the son. It terminated at the death of the *paterfamilias*, when each son not under age became *sui juris*, and attained the headship of his own family; at the loss by the *paterfamilias* of the right of citizenship or of liberty; at the son's attaining the dignity of *flamen*, or the daughter that of vestal virgin; and after a solemn sale of the son, thrice repeated, followed by enfranchisement, all known as emancipation. When the father thus freed his son from the iron bands of the family, the latter lost all claim upon the father; he abandoned the right of inheritance; he was thenceforth a stranger to his own blood.

§ 509. This paternal power was unbounded through the sphere of the family. It extended to the property, liberty, and lives of all subjected to its dominion. The ancient *paterfamilias* reigned supreme in his community of descendants. He was a judge from whom lay no appeal. His son who had reached manhood, who was even married, was, with his wife and children, to all intents the chattel of the family head. All property acquired by the descendants belonged to the chief. During his lifetime their personal

rights were in abeyance, and were only enjoyed for the benefit of the stern *paterfamilias.*

§ 510. 2d. *Manus.*—This was the power which the *paterfamilias* held over his wife, joined to him by a complete legal marriage (connubium). For a legitimate marriage, the parties must be at the age of puberty and free; both must be patricians or both plebeians, and the union must not be incestuous. Mutual consent was indispensable, and when either of the parties was under the power of a father, his consent was also necessary.

Complete legal marriage might be perfected by usage or prescription (usu),when the possession by the husband of the wife had continued uninterrupted for one year. A more solemn form was known as confarration, which was accompanied with peculiar religious rites. A third form was denominated *coemptio*, or buying, and consisted in a formal and public sale and purchase of the wife. In addition to this legitimate marriage, which was accompanied by the power called *manus*, the law recognized another kind of wedlock called concubinage, which was divested of these severe restraints upon wife and children, but which conferred none of the special privileges belonging to the citizens.

§ 511. When a daughter married, she passed out from under the power of the head of her own family, into the *manus* of the chief of her husband's family. The extent of the marital power of the *paterfamilias* was the same as that which he possessed over his children. His wife was to him legally as a daughter; she was in the place of sister to her own children, and inherited from her husband as one of them. The *paterfamilias* was her lord, her master, her judge, her lawgiver; her liberty and life were in his hands; her dignity as *materfamilias* was an empty show.

§ 512. 3d. *Mancipium.*—This species of power was acquired by the solemn sale of a freeman. It was used for the purpose of emancipating a son from the paternal power of his *paterfamilias.* The father made a solemn public sale

of his son to a third person, who immediately emancipated his purchased chattel, and the latter fell again under the domestic yoke. When this process had been repeated three times, the law declared the last act of emancipation valid, and the child was free from the family tie.

§ 513. 4th. Agnation, or Family Relationship. (Agnatio, agnati.) The persons thus under the power of a living *paterfamilias*, including wife and descendants, or who would have been under his power were he still living, were bound together in a close family relationship termed agnation. Among these relations or agnats, were confined all the privileges of the Roman family as a domestic institution, and as an important civil element in the state. Among the rights pertaining to the agnats was that of inheritance from the family head, or from each other, and that of guardianship over minor children, and over the women, when the *paterfamilias* was dead.

§ 514. 5th. This leads me to describe another species of persons *alieni juris*, those subjected to the control of tutors or guardians, and of curators. When the *paterfamilias* died leaving children of either sex under the age of puberty, or unmarried daughters of any age, or a wife, these were all placed under the control of a tutor or guardian. Thus the early Roman law did not recognize the ability of a woman in any condition of life to manage her own affairs. The daughter was under the paternal power during the lifetime of the *paterfamilias* until her marriage. Upon that event she passed under the *manus* of her husband, or of her husband's father. At the death of the one whose dependent she was, whether father or husband, she was not freed, but was transferred to the care of a tutor, who was chosen from the *agnats*, or family relations of the family to which she then belonged. Thus the unmarried sister might fall under the control of her own brother, and the widowed mother under that of her son.

The power of the tutor extended to the persons and

property of the wards, but was not so unlimited as that lodged in the hands of the *paterfamilias*. The tutor was appointed by the last will of the *paterfamilias*, or, in default of such an appointment, the right devolved upon one of the agnats. Curators were a species of guardians placed over the insane, idiots, or spendthrifts.

§ 515. I cannot better close this detail of the primitive Roman family relations, than by quoting M. Troplong's graphic and picturesque description. "What was the Roman family? Was it founded upon blood and nature? No. It was the civil bond of power (potestas, manus) which united its members and maintained their segregation. One was not a member of a family simply by being a son, or a wife, or a relation, but by being a son under power, a wife under power, a relation by submitting to an actual common power, or which would have been such had the chief remained alive. In a word, the Roman family, the singular creation of a people born for power, was simply an assemblage of individuals recognizing the power of a single chief. Whoever recognizes this power is in the family; whoever was freed therefrom, although child or descendant, was not in the family. Simple marriage was an insufficient bond to bring the wife into the family of her husband; she yet remained in her own family, under the name of matron; she was a stranger to that of her children. But if the nuptials were followed by a year of possession of the wife by the husband (usus), or if they had been consecrated by the religious and patrician ceremonies of confarration, or had been accompanied by the civil forms of sale (coemptio), then the wife passed under the power of her husband. She became *materfamilias*, and this power completely breaks her spirit by its character of austere severity; for the husband was judge of the wife; he was able alone, in the older times, later by aid of a family council, to condemn her to death; he is master of her person and of her goods, almost as if he had obtained her by conquest. And since the power

made the family, the wife quitted her own, to enter that of her husband. There she was received as a daughter; she had only the rank of sister in blood to the children whom she had given to her husband. Outwardly, without doubt, she will participate in the honors of her husband; she will be surrounded by an official respect. But in the bosom of her family she bows before the majesty of her lord. She has not the right of property while her husband lives, and she will inherit from him only as the adopted daughter of this civil father. The death of her husband will not cause her to pass again into her own family; a sacred bond retains her in that which she has adopted; she will find there a legal tutor among her own agnats, or a testamentary tutor of her husband's choice.

§ 516. "By the side of this power was another, enjoyed by no one except a Roman citizen,—the paternal power. What shall I say of this terrible power, which was one of the bases of the Roman constitution? It absorbed in the *paterfamilias* the persons of the son, and of the wife in the power of the son, and of his children, and all the property which he had acquired. The father is in this sanctuary judge supreme; he exercises over his children a legislation invested with the right of life and death. But it was not nature which gave this power; it did not proceed from natural filiation. It was a creature of the civil law, and extended as well over children adopted from strangers, as those born in the wedlock.

§ 517. "Wherever the power of the father extended, the family also extended its branches. All those who were bound by these rigorous ties, or who would have been bound if the common author had not been dead, had among themselves a civil relationship called *agnatio*, which alone gave the rights of the family and of succession to property. The aggregation of *agnats* alone formed the Roman family, and had the right to be counted in forming the political family, the *gens*. It is in the bosom of this civil family

that the father will find heirs to perpetuate his name; it is there that the rights of inheritance and of tutorship are deposited."

II. OF THINGS, WHICH MAY BE THE OBJECTS OF RIGHTS.

§ 518. The arbitrary character of the ancient Roman law was not confined to the domestic relations and the rights of persons. Contrary to equity and natural justice as were its rules in reference to these subjects, its provisions regarding the rights of property were equally rude and national. They reflected the stern Roman spirit everywhere, struggling to aggrandize the state, to regard the individual merely as an unit in the commonwealth.

§ 519. 1. *Classes of Things.*—The divisions which the ancient Roman law made, were not those adopted by the English and American jurisprudence, lands and chattels. The same rights, the same kinds of property, the same methods of acquisition and transfer, applied to each of these two species of possessions, between which the feudal spirit has left so broad a line of demarkation in modern legislation. Yet there were classes of things, having their origin in the national manners and history.

§ 520. 1st. There were things of a superior character over all others, such as were the objects of desire among the primitive Romans, and appeared most precious to the military and agricultural simplicity of the people. This division included the farms, and the houses of the city and country about the city, the slaves, and the beasts of burden and industry, the ox, the horse, and the ass. Such were the articles whose possession excited the ardor of the first simple Romans. The state, which had obtained them in war and divided them among the citizens, was considered as the sacred source of this patrimony. Hence the property in these things was regulated by the intervention of the state, whenever they were transferred from one to another. These things were known as *Res Mancipi.*

§ 521. 2d. All other things, however rare and costly, were considered as inferior, and were included in the class *res nec mancipi*. The early civil law passed them by as of little moment, and so far as rights of property in them were concerned, left them to the operation of the laws of nature.

§ 522. 2. *Kinds of Property which might be had in Things.*—Corresponding to the two classes of things, were two kinds of property or species of ownership, which might be had in them.

1st. The first of these was the true Roman or Quiritary property (property ex jure quiritum), which was the especial creation of the civil law. This species of ownership could only be enjoyed by a Roman citizen. A stranger might possess the objects of this kind of property during any extent of time, the ownership still would not appertain to him. The class of things which might thus be subjected to the peculiar dominion of the Roman citizen, were the *res mancipi*—the farms and houses, the slaves, the beasts of burden and industry.

§ 523. The peculiar and arbitrary characteristic of this purely Roman property was that it could not be lost or parted with except by the observance of certain well-defined forms of sale. If these forms had not been followed, any transfer of an article belonging to the favored class was absolutely void, and the original owner might retake it from the hands of any possessor, even from one claiming it in good faith, and who had paid for it a full price.

§ 524. The methods of acquiring and transferring the Roman property, or *dominium ex jure quiritum* from one citizen to another, were three.

1st. Mancipation. This method transferred the property at once. It recognized the original proprietorship of the state, and called it in to preside over each sale from one owner to another. In the earlier stages of Roman civilization, this was the common mode of purchase and sale. The two parties, the seller and the buyer, must both be citizens,

and in each other's presence; there should also be a weigher to measure out the price, who must be a public person, and five other citizens as witnesses. The thing to be sold, if movable, must be present, within the touch of both parties. The price was then weighed out, and certain indispensable formulas said over, and the Roman property was transferred.

2d. Another method by which a citizen might acquire this dominion or right of ownership, was prescription (usus, usucaptio). This consisted of a constant possession of land for two years, or a chattel for one year, and at the expiration of that time the mere occupancy was changed into the Roman property.

3d. The third method consisted in a fictitious action before a magistrate. The new proprietor demanded the thing, the old owner did not object, and the officer decreed that the claim should be allowed.

§ 525. Such was the exalted Roman right of property, carefully guarded by the earlier civil law, sternly refused to a stranger, the birthright of the citizen, entirely opposed to the milder and equitable *jus gentium*. The course of time and the progress of civilization, acting through the prætorian legislation, gradually relaxed the sternness of this species of ownership, and finally caused it to disappear from the national jurisprudence.

§ 526. 2d. The second kind of property was that in things of the class *res nec mancipi*, and might be enjoyed by citizens or strangers. The characteristics of this ownership, and the methods of acquiring and transfer, were simple and equitable. The things subjected to it were considered unworthy to participate in the sacramental solemnities of mancipation; they had no civil method of alienation; mere delivery sufficed to convey a right of ownership; they were governed by the natural law.

§ 527. 3. *Succession to the Estate of a deceased Person.*— The ancient Roman law provided two methods of succession

to the estate of a deceased person; by last will, and by the disposition made of the property when there was no will.

1st. By Will. For a person to be able to make a will, he must be a master of his own property, not under paternal power, or under a tutor or curator. The ancient wills were of three kinds. One, used in time of peace, consisted of a declaration made by the testator before a special assembly of the people. Another was used by soldiers in time of war. The third or most common form consisted of a fictitious sale, made by the testator to the persons intended as heirs, attested by witnesses, and reduced to writing. The simple form of will resembling that now in use was introduced at a later period by the prætors.

§ 528. The essential feature of the will was that it must contain some person or persons as heirs. The heir thus designated took all of the property, and was subjected to all of the debts and obligations of the testator. Thus the deceased was perpetuated in his heir. Subsequent modifications of the law relieved the heir from this absolute liability to pay the debts of the decedent, and gave him a time to examine and decide whether he would accept the inheritance, and at a still later period he was compelled to pay the debts only to the amount of the property which he received.

§ 529. 2d. Succession in Case of Intestacy. When no will was made, the law regulated the inheritance. Those to whom the property primarily descended were the persons who, at the time of the death, were in the actual power or *manus* of the deceased, including the wife, sons, and unmarried daughters. The property was equally divided among them, but the widow and unmarried daughters, and all children under the age of puberty, were put in the care of a tutor. These heirs inherited, not so much because they were of the same blood as the decedent, but because they had been under his common power. In case there were none of these heirs, the estate was divided among the *agnats* or family relations of the deceased, those who with him had

been under the power of a common *paterfamilias*. These failing, the members of the *gens* or house succeeded to the inheritance. Thus the Roman law, at its foundation, disregarded the tie of blood, which the English legislation assumes as the foundation of the rules of succession and inheritance, and substituted in its place the purely civil bond of the Roman family, united under the arbitrary and implacable nexus of the power of the *paterfamilias*.

### III. OF OBLIGATIONS.

§ 530. The term obligation was not used until a later period of the Roman law, but in the most ancient times there existed those rights to which this name was afterwards applied. In this primitive state of the jurisprudence, obligations were intimately connected with the technical forms of action which have been described in a former chapter; indeed the law laid no duty upon an individual, unless it was such as could be enforced by some known judicial proceeding.

These rights inhering in one person, and corresponding duties in another, were entirely the creatures of the civil law; natural obligations were not recognized by the Roman citizen or the old Roman legislation, but were afterwards introduced and enforced by the prætors, who finally built up so splendid a structure of equitable rules upon this rigid foundation of the early national law.

§ 531. A legal obligation then, during the epoch we are considering, was that by which an individual (reus, creditor) had the right to force another by a judicial action to fulfil his engagements, even at the sacrifice of his liberty and property. Of these there were two general classes: those arising from a contract (ex contractu), and those arising from a fault (ex delicto).

§ 532. 1. Of obligations arising from a contract. Contracts were of two kinds: those which were based upon a prior delivery of something by the demander to the defend-

ant, from which a duty arose to return either the very thing or its value, or to do some service; and those which were perfected by a verbal promise in which all of the formalities prescribed by the law had been strictly observed.

§ 533. 1st. Contracts based upon the prior delivery of something could be made in two modes, viz.: when the intention was that the thing itself or one of the same kind should be returned; or when it was to be exchanged for a different thing or for some service. Of the former class there were four contracts, afterwards known as *Mutuum*, *Commodatum*, *Depositum*, and *Pignus*. *Mutuum* corresponded to our loan of money or other thing when the borrower contracted to return the same kind of thing as he received. *Commodatum* was the gratuitous loan of some article, and the obligation was to restore the identical thing. *Depositum* was the gratuitous deposit or entrusting of an article by its owner to the care of another for safe keeping, with the understanding that it should be redelivered when called for. *Pignus* or pledge was the delivery of a thing by a debtor to his creditor as security, and the duty rested upon the latter to return the chattel when the debt was paid. The law gave a special action to enforce the obligation arising from each of these contracts.

Contracts of the second class were those in which a person gives or does something, that another may give or do something else in return, and were well expressed by the pithy Latin formulas, *do ut des*, *do ut facias*, *facio ut des*, and *facio ut facias*.

§ 534. 2d. Contracts perfected by words. All contracts containing a reciprocal obligation could be the foundation of an action, where they were composed of a verbal question proposed by the creditor, and a reply to this demand from the other party. The form of solemn question and answer was common among the Romans. In this species of obligation it was not conscience, nor a notion of justice or injustice which bound the party, it was simply the word,

the outward literal form in which the agreement was cast. The Twelve Tables enacted, *Ubi lingua nuncupasset, ita jus esto.* Nothing was considered as promised, but that included in the very formula, in the question and answer. For example, if the seller should conceal a hidden defect in the thing sold, he was not held by any obligation to make restitution to the buyer for the fraud, for he had engaged nothing in regard to this thing by his words.

This entire absence of good faith in the contracts recognized by the primitive law, was gradually remedied by the pretorian judicial legislation, and the equitable obligations introduced by these magistrates were extensive enough to embrace all of the transactions of a great and busy people.

§ 535. 2. The obligations arising from faults (ex delicto), which the old law noticed, were few. Certain acts which modern legislation regards as crimes were treated by the Romans as the foundation of a legal duty to make reparation, which could be enforced by a civil action. Among these the principal were theft, damage to the property of another by carelessness or other unlawful means, and injuries to the person of another (furtum, damnum, injuria).

§ 536. Such were the principal features of the ancient private law of the Romans, as it affected persons, things, and obligations. It was certainly rude, arbitrary, unnatural. But at the same time it was a comprehensive system, embracing all the topics found in the legislation of a later age. How superior is it in all respects, as a system, to the early codes of the Franks and Saxons. The rules thus stated remained the basis of the jurisprudence through its whole progress, and gave form to the new growth built upon this foundation.

## THE PHILOSOPHIC AND CHRISTIAN PERIOD.

§ 537. From the severe, arbitrary, aristocratic civil law of ancient Rome, the progress was steady through the pe-

riod of the republic and the earlier empire, towards a complete agreement with natural law and equity. Of the means, methods, instruments, and spirit of this development; of the prætors, and their moulding power over the national jurisprudence; of the jurisconsults during the empire, and their enlightened and philosophic discussion of legal principles, and their systematizing labors and suggestions to the magistrates; and of the imperial constitutions, I have sufficiently treated in Part First. I now propose only to give a sketch of the result of these centuries of improvement, as it is summed up in the Institutes of Justinian. The commencement and close of this national jurisprudence thus brought into contrast, will enable us to judge of the immense power of courts animated by the spirit of an advancing civilization, in building up a system of municipal law.

I shall treat in order, I. Of Persons; II. Of Things or Property; III. Of Obligations.

### *First. Of Persons.*

§ 538. 1. The general division still existed of slaves and freemen. Slaves were those born of slave mothers, those taken captive in war, or those who suffered themselves to be sold into servitude. The legal condition of all slaves was the same, but the master's ancient irresponsible power had been taken away since the prevalence of Christianity.

Those not slaves, were either freemen (ingenui), who were born of free parents, or even of a free mother, and freedmen (libertini), who had been manumitted from servitude. After the empire became Christian, increased facilities were given for manumitting slaves, and freedmen came to hold all the rights of Roman citizens. When a slave was made his master's heir by will, he became free thereby. Yet it was unlawful for an insolvent master to set his slaves at liberty in fraud of his creditors. Unless the actual intention to defraud existed, however, the freedmen retained their

liberty, although the owner's property was insufficient to pay his debts.

§ 539. 2. THE DOMESTIC RELATIONS.—*Husband and Wife.*—The basis of marriage was the consent of the parties, which must be accompanied by that of the parents if either party were under the paternal power. A parent who unjustly withheld his consent could be compelled by a magistrate to agree to the marriage and to give the requisite dowry. The consent must be free and unconstrained. Marriage contracts were common in the later periods of the empire. It was the duty of the father to give his daughter a marriage portion or dowry, according to the amount of his property, but not so much as to defraud his creditors. On her death this dowry returned to the father. The wife's dowry might also be taken from her own property, and if she were of full age, and not under the paternal power, she might herself set apart a portion of her property for this purpose. The husband also added a share of his property, to be used with the dowry for the benefit of himself and wife. During the marriage he had the full control of the whole of this, and was entitled to the rents and profits for the support of the family. Whatever the wife owned in addition to her dowry, was called her *paraphrena*, and was absolutely her own, entirely beyond the husband's control.

§ 540. Marriages were prohibited between all persons related in the direct ascending and descending lines, between parents and adopted children, between brothers and sisters, between a man and the daughter or granddaughter of his brother or sister; but cousins might marry.

The wife was under the power of the husband, but this power no longer included the right to punish or to deprive of life, but simply constituted him the legal head of the family. At his death she was one of his representatives, and inherited a portion of his estate with her children.

Before the empire became Christian the utmost latitude of divorce existed, so that either party might terminate the

marriage relation at will. The Christian ideas greatly restrained this license, and divorce was prohibited by imperial constitutions, except for a few specified causes.

§ 541. *Parent and Child.*—The children born in lawful wedlock were under the father's power, and this control extended over the children of sons. In short the form of the old Roman family with its *paterfamilias* was left, but its distinctive features had long been lost. The paternal power, once so terrible, was now only that natural dominion which the parent should have over his child.

The law also gave the right of adopting children, who were received into all the privileges and subjected to all the duties of those born in wedlock. There were two kinds of adoption, the one effected by means of an imperial mandate or order, the other by the authority of a magistrate. Restraints were placed upon this practice, intended to secure the welfare and property of the child. One might adopt another either as his son or as his grandson. Women could not adopt children, nor were their own offspring even under their power; during marriage this right was enjoyed by the husband alone, after his death it was confided to a guardian. The power of the father was terminated by death, and his children became independent. An act of emancipation also destroyed this power; the ancient form of emancipation by sales of the child had been abandoned, and the act was simplified into a mere declaration before a magistrate.

§ 542. *Tutors and Pupils.*—Male children under the age of fourteen, and females under that of twelve, were considered as having no discretion. At the death of the father before they arrived at these ages, they were placed under the care of tutors or guardians. A father might appoint tutors for his infant children by his last will, and they were then called testamentary tutors. When no testamentary tutor was named, the office devolved upon the nearest of the agnats of the infant, or his relations on the father's side.

Such tutors were called legal. In default of either of these, the prætor or the president of a province appointed the guardian.

The authority of the tutor extended to the care of the pupil's person, and the management of his property. Most engagements of the infant, in order to be binding upon him, must have been made by the tutor on his behalf. The rule was that the pupil might better his condition, but could do nothing which might impair it, without the authority of the tutor.

§ 543. The tutorship lasted until male children reached the age of fourteen, and females that of twelve, but was succeeded by a curatorship, which lasted until the children attained the age of twenty-five. Curators were appointed by magistrates. The insane, the idiotic, and the prodigal, were also subjected to this species of guardianship. These fiduciary officers, except testamentary tutors, were compelled to give security for the faithful discharge of their duties. It was a part of the prætor's jurisdiction to exercise an oversight and control over tutors and curators, to compel them to account, to remove them if faithless, to demand security from them, and generally to enforce a strict observance of their duties, and to protect the interests of pupils and wards.

## *Second. Of Things.*

§ 544. I. Of the different Kinds of Things.—Certain things were not the subjects of private property. Some of these were common to all mankind by the law of nature, such as the air, running water, the sea and its shores, rivers and their banks, ports, the right of fishing in the sea and in rivers, and of landing and mooring on their banks. Other things were removed from the domain of private property because they were dedicated to the public or consecrated to religious uses, such as theatres, race courses, churches,

burying places and tombs, the walls and gates of a city. Other things might be owned and possessed by private persons as their own.

§ 545. Things were divided into corporeal and incorporeal. Corporeal things were tangible, and embraced houses, lands, goods, and chattels. Incorporeal things included such as were mere rights or privileges, as usufructs, uses, and servitudes. The ancient distinction of *res mancipi* and *res nec mancipi* had disappeared.

§ 546. Incorporeal things require some more particular description.

*Servitudes.*—These were either rustic or urban. Rustic servitudes were certain rights annexed or belonging to one estate, and extending over the land of another. They were rights which one proprietor had, to use the adjacent soil of a neighbor. They included the right of path, of road, of highway, and of aqueduct or passage for water. Urban servitudes belonged to buildings, whether in the town or country, and included the right of support for beams upon the walls of a neighbor; the right of drip or discharge of water from one's eaves upon a neighbor's land; the right of light, which the neighbor could not obscure by building on his own soil. These servitudes required an estate to support them, that is, they were accessories of landed property, and did not simply belong to a person distinct from his character of owner of the particular building or farm. Our own law borrows these same rights from the Roman, and denominates them easements.

§ 547. Other incorporeal things appertained to persons, and not to estates.

*Usufruct.*—This was the right to use and enjoy, without destroying or consuming, things which were the property of another. This species of incorporeal property was often created by will, when the naked ownership of a thing was bequeathed to one person, and the usufruct for a specific time to another. Usufructs might be granted in lands,

houses, slaves, cattle, and the like, but not in those things which are consumed by the use. The right ended with the death of the person enjoying it, or with the expiration of the time for which it was created. *Use* (usus), was a lesser right than usufruct, for it gave the possessor only the privilege of using another's property as occasion required, and could not be transferred or sold as could an usufruct. *Habitation* was the right which a person held to occupy the house of another.

§ 548. II. Methods of acquiring Property in Individual Things.—1. *Occupancy.* Certain things became the subjects of private property by mere possession or occupancy, such as wild beasts and fowls. The Roman law was minute in its enumeration of instances where mere possession or occupancy, or something analogous thereto, gave a private right of ownership. This minuteness of division well illustrates the refinement of that law. The ground which was added to a person's land by gradual accretion from a river became his property, but that which was cut off from another's soil by the overwhelming force of the stream, and joined to his, still continued the property of the former owner. When a person made a specific article, with materials belonging to another, without the latter's consent, if the article could be reduced to its former shape, it belonged to the owner of the original material; but if it could not be so reduced, it remained the property of the artificer. For example, if one should construct a cup of another's gold, the vessel would belong to the owner of the metal; but if one should make wine of another's grapes, the wine would belong to the trespasser, though he would, of course, be liable to the owner of the grapes for their value. But if a person should make an article partly with his own, and partly with another's material, it became entirely his. If materials belonging to two persons were mingled by mutual consent or by chance, the whole mass was common to both proprietors.

If, however, one should mix another's materials, such as corn, with his own, the mixture would not be common. If a man should build a house on his own ground with the materials of another, the property became his own, yet he would be liable to the owner for double their value. On the contrary, if a person should build with his own materials on the land of another, the edifice became the property of him to whom the ground belonged. These principles were extended to many other cases.

§ 549. 2. *Prescription.* Property in things might be acquired by prescription (usucaptio). This took place when the holder came at first honestly though mistakenly into possession. In such case, possession of movables for three years, and of lands for twenty years, conferred an absolute right, even against the original owner. A title to things stolen could not be acquired by prescription. Our own law recognizes this method of acquiring property in lands.

§ 550. 3. *Donations.* Another method of acquiring property was by donations or gifts. Gifts were of two kinds, those *causa mortis*, or in view of death, and those *inter vivos*, or between the living, and not having reference to death.

A gift *causa mortis* took place when a person, under apprehension of death, gave a thing to another, with the condition that if the donor should recover, it was to be returned. Donations *inter vivos* were not made under expectation of death; they became perfect when the giver had manifested his intention, but the later law required an actual delivery of the article to render the gift valid. As the name implies, these transfers were made without any consideration or return from the receiver, and therein differed from sales. Our own law has borrowed these kinds of gifts from the Roman, together with most of the rules regulating them.

§ 551. 4. *Sales.* Another method of acquiring property was by sale and purchase. In general all things, except

those sacred or public, whether lands or movables, corporeal or incorporeal, might be bought and sold. The peculiar Roman property (ex jure Quiritum), never prevailed in the provinces, and it had long ago given place to the natural property as recognized by the *jus gentium*. So the ancient form of mancipation was never in use beyond Italy, and had been abandoned there, while the simpler forms of mere agreement and delivery of the thing sold had become universal. The contract of sale was complete when the parties had agreed upon the thing and the price. But the property did not pass, even after a delivery of the thing, until the buyer had paid the price, or given some security, unless the sale was definitely made on credit. The delivery might be made by the seller, or his agent, and might be symbolic; for example, when a person had sold merchandise deposited in a store house, he was understood to have transferred the property, upon delivering the key to the buyer. There were some restrictions upon the right of sale. A husband could not alien the lands which came to him by right of his wife, without her consent, nor could a pupil convey his property, without the authority of his tutor. Creditors might sell the articles pledged to them, if the debt for which they were security was not paid at the time.

§ 552. The law allowed persons to acquire property, not only by themselves, but by those under their power, as slaves and children not emancipated. We have seen how severe the primitive Roman law was in this respect; that all things acquired by a slave or child belonged absolutely to the *paterfamilias*. It was a part of the more just rules introduced by the prætorian legislation, to allow to children and afterward to slaves, the free use and ownership of a portion of property called their *peculium*. This *peculium* consisted of property acquired by the child or slave through his own industry or by gift, and with the consent of the father or master. Justinian still further extended the privilege of the son, by allowing him to retain as his own all

that he obtained by his labors or otherwise, without help from his father's patrimony.

§ 553. III. METHOD OF ACQUIRING PROPERTY IN THE ENTIRE ESTATE OR SUCCESSION OF ANOTHER.—Property in an entire estate might be acquired, 1st, by a last will or testament; 2d, by succeeding to the estate of an intestate; 3d, by adrogation; and 4th, by the judicial sale of the effects of an insolvent.

1. *Of Last Wills or Testaments. Forms of Wills.*—The primitive law, as we have seen, gave three forms for a will; one, consisting of an act done in the public assemblies of the people; another, made without any observances, before going into battle; and the third, consisting of a public fictitious sale of the inheritance from the testator to the heir. The two former species of testaments had long been disused; the third lasted until a late period of the empire. The prætors, however, in the discharge of their legislative functions, invented another and far more simple description of will, which became the one in common use. This consisted of a written instrument, attested by the seals of seven witnesses. The imperial constitutions added to these prætorian requisites, that the will must be subscribed by the testator and the witnesses, at one and the same time, in each other's presence. Certain persons could not be witnesses. In general, those who could not make wills could not witness one. Nor could the heir named in a will attest it; but the reason of the rule was a technical one, based upon the idea that the transaction was directly between the testator and the heir, and that the latter could not be a witness for himself. But legatees, or those who received specific gifts by a will, might attest it. The will might be written on wax, paper, parchment, or any other substance. In certain instances the testament might be verbal, if made in the presence of seven witnesses, and was then called a nuncupative will. All persons were capable of making wills, except those under the power of an-

other, minors, the insane, the idiotic, the prodigal, and sometimes the deaf, dumb, and blind.

§ 554. *The Substance of a Will.*—The important provision of a will, without which it was entirely nugatory, was the naming in it of some person or persons as the heir or heirs, to whom the entire property of the testator should pass at his death, and who would represent the deceased, forming a legal perpetuation of his person. When this heir was a single individual, he inherited the whole property by himself, except so much as was specifically left in legacies; if several were named as heirs, they inherited the estate collectively and jointly.

§ 555. The Roman law had from the beginning required that, to insure the validity of the will, the sons of the testator under power should be named as heirs, or expressly disinherited by name, and not in general terms. If a son was passed over in silence, the will was void. The rule, however, did not extend to daughters, or grandchildren of either sex. Justinian altered the law, and required all children, and all grandchildren in the male line, to be named as heirs, or disinherited by name.

§ 556. Any one might be appointed heir, even a slave. A person could not die partly testate and partly intestate; that is, he could not dispose of a portion of his property by will, and leave the rest to be distributed as in the case of death without a will. If, then, a man should name but one heir, and gave him only a part of the estate, the whole would nevertheless become his. Some intricate rules, which it is not necessary to state, were adopted to regulate the distribution of the shares among several heirs appointed by the same testament.

§ 557. An heir might be constituted absolutely or conditionally, but not by a condition which would necessarily happen only after the death. In case of such a provision, the designation of the heir was absolute, and the condition void. Impossible conditions were also void.

§ 558. A testator might name successive heirs, so that, if the first should die, or refuse to accept the inheritance, the second should be substituted in his place, and the series might be indefinitely continued. Of course, when one of these heirs did accept and succeed to the estate, the rights of all subsequent ones were cut off. Such a provision was called the vulgar substitution of heirs. A person might also make his minor child his heir, and provide that, if he should succeed to the inheritance and should die while yet an infant, another should be substituted as the heir. This was called pupillary substitution, and amounted, in fact, to two wills, one of the father, and the other of the infant son. It was the custom for the testator to fold up and seal that part of the will which contained this pupillary substitution, so that it could not be opened until needed at the death of the child while yet a minor. This was done to prevent any danger to the welfare of the infant heir.

§ 559. These rules of the Roman law were somewhat different from our own. By the English and American law, as has been explained in the chapter on the feudal system, the person who receives the whole or a part of an estate by will, is not the heir. Nor need a will entirely dispose of the property, but that only passes to the persons designated which is specifically directed by the testator, so that a person may die partly testate, and partly intestate. We have not adopted the principle of substitution, although the common law of England and the American States allows a method of disposing lands by will which to all intents amounts to the Roman substitution. A testator may devise lands to one person for a specified period, or for life, and direct that at the expiration of that time, or at the death of the first recipient, the property shall pass to another. We have here not the form, nor the name, but the result of the Roman substitution of heirs.

§ 560. A will legally made remained valid until it was either broken or rendered ineffectual. A testament was

broken by a subsequent adoption or birth of a child, or by a subsequent perfect will. An expressed determination to break a will, was not, however, effectual, unless it was fully carried out by the formal execution of a new testament. Wills were sometimes said to be inofficious or ineffectual. This took place from extrinsic circumstances, although the instrument was perfect in form. When children had been unjustly disinherited or omitted from the will, they might complain that the testament was inofficious, under the fiction that the parent was of unsound mind, and procure it to be set aside. It was not understood that the testator was really insane, for in such case the will would have been absolutely void, but the whole principle was introduced by the prætors, in order to promote substantial justice.

§ 561. Heirs appointed by will were of three classes, and each class had its peculiar rights and duties. These divisions were, necessary heirs, proper and necessary heirs, and strangers. A slave named as heir by a will was called necessary; he became free, and was compelled to take the inheritance with all its burdens, to pay all the testator's debts, and fulfil all his obligations. Proper and necessary heirs were sons, daughters, and the children of a son. By the primitive law they also were required to accept the inheritance when appointed, and to assume all obligations, and pay all debts of the deceased. The prætors, however, by their equitable legislation, had relieved them of the necessity of accepting the inheritance under a will, and had given them a time to examine into the condition of the estate, and to elect whether to receive or refuse it. When, however, they once assumed the character of heirs, the full responsibility for the debts and obligations of the testator rested upon them. Strangers were all others not under the power of the deceased. They also possessed the privilege of election, but if, by any act, they indicated their intention to accept, they were bound by the decision. The same burden rested upon them as upon the second class. Justinian modi-

fied these rules, and gave to all heirs but those called necessary the benefit of an inventory; or, in other words, he released them from all responsibility to pay the debts of the deceased, beyond the amount of property which they had received by the will. A comparison between the Roman heirs and heirs according to the English law, and between the liability resting upon the Roman heir after the legislation of Justinian, and that devolving upon an administrator by our own law, is given in the preceding chapter on the feudal system.

§ 562. *Legacies.*—A legacy was a gift by will of a particular thing to some person or persons, which the heir was bound to carry into effect. The Roman law made a broad distinction between the heir and the legatee, or individual who received a legacy. The one, either singly, or in connection with his coheirs, received the whole estate, and succeeded to and represented the deceased. This general gift of the property of the testator, with its attendant burden of discharging all the debts and obligations, might also be charged in the will with particular burdens, viz: the delivery of specified articles to the legatees. The rules in respect to legacies were very favorable to the legatee. The testator might bequeath articles belonging to another person, and the heir was obliged to purchase and deliver them to the legatee, or pay him their value. If the thing bequeathed had been pledged by the testator for debt, the heir must redeem it, and complete the gift; so also if the thing bequeathed had been the property of another, and the legatee had purchased it, he still could recover its value from the heir. The same rule applied, if, after the making of the will, the thing bequeathed had been sold by the testator. Any kind of thing could be given as a legacy, and a debt could be discharged in this manner. If the gift were to two legatees, it must be divided between them if both lived, but, if one died, the other received the whole. Instead of directing the heir to deliver a specified article, the testator

might order him to do a particular act on behalf of the legatee, as, for example, to build a house. A legacy could not be given to an uncertain person, but a mistake in the legatee's name, or a false description of the thing bequeathed, did not vitiate the legacy, provided the identity of the individual and of the article was sufficiently certain. So the assignment of an incorrect reason for the gift did not invalidate it. The legacy might be revoked, or transferred from one person to another, by the same will, or by a codicil. The later emperors, in their constitutions, placed a limit on the power of testators to give legacies, and ordered that not more than three fourths of an estate should be disposed of in this manner. The reason of this rule was, that a sufficient amount might be preserved for the heir, to induce him to accept the inheritance, and carry out the provisions of the will.

§ 563. *Fidei Commissa; or Trusts.*—The disposition of the property of a testator called *fidei commissa*, or trusts, was contrived in the later part of the republic, in order to evade severe laws passed by the people or the senate, which forbade inheritances to be left to certain classes of individuals. When a testator wished to make a gift of his estate in this manner, he first appointed an heir by his will in the regular way, and added the request that the heir, upon coming into possession, would transfer the inheritance, or a certain designated portion of it, to some other person named. Such bequests were called fiduciary, because they did not confer any legal right upon the individual whom they were designed to benefit, but depended alone upon the good faith and honor of the heir for their accomplishment. They evaded the strict law, but were not themselves illegal, for by the will the heir became absolute owner of the property, and might do with it as he pleased, and it was therefore entirely within his power to make a gift of it to the person pointed out by the deceased. Under the Emperor Augustus the first step was taken toward enforcing the observance of

these testamentary dispositions of property, and they became so common that a special prætor was appointed to take cognizance of and decide cases involving them. The words of mere request in the will, which at first the heir might obey or disregard at his option, came to have the effect of positive commands, which he could not evade. When this had been established, the person to whom the estate was actually transferred, or, in our language, the beneficiary, became to all intents the heir, and all actions in reference to the inheritance, which could be brought by or against the original technical heir, were transferred to him; as he was the virtual owner, the law clothed him with the owner's responsibilities. Under the Emperor Vespasian a decree of the senate was made, ordering that when the heir named in a will had been directed to transfer the whole inheritance to another person, he might still retain one fourth part for himself.

The principle of *fidei commissa* has been borrowed from the Roman law, and incorporated into our own, but has been greatly extended and modified by its union with the feudal ideas of landed property. The uses and trusts of our common law are a direct result from this Roman original.

§ 564. *Codicils.*—In addition to the will, or even without the existence of one, a testator could dispose of legacies, and fidei-commissary gifts, by codicils. These were writings expressing the wish of the deceased, but requiring none of the peculiar solemnities of the will to insure their validity. A whole inheritance could not be given by a codicil. Our own law recognizes no such thing as the Roman codicil. With us codicils are additions made to a will already executed, by which some change is made in the provisions of that instrument; and they are executed in the same manner as the will itself.

§ 565. 2. *Of Succession to the Estate of an Intestate.*—A man died intestate who had made no will, or who had made one not in due form of law, or who had made one which

had been cancelled or broken, or under which no heir would accept. In the case of intestacy, the law designated the persons who should succeed to the property.

§ 566. The first class of persons to whom the estate of the intestate fell, were his descendants, who at his death were under his power. These included children living and posthumous, legitimate and adopted, and the descendants of sons, but not of daughters. In dividing the inheritance among these heirs, the law constantly kept in view the original number of the decedent's children. If the children were all living, they shared the property equally; but if the original number had been for instance four, and one son had died, leaving children, the inheritance would still be divided into four shares, one for each of the survivors, and one for the descendants of the deceased brother. If the original family consisted of sons, and all had died leaving children, the property would be separated into as many equal portions as the number of dead sons, and the different sets of grandchildren would inherit their fathers' share. This is called inheriting *per stirpem*, by the stock, and not *per capita*, by the heads or individuals.

§ 567. By the primitive law, as we have seen, an emancipated child lost all family rights, and, among others, that of inheritance. In the course of time the prætorian legislation practically repealed this unnatural rule, and gave emancipated children virtually the same rights of inheritance as those enjoyed by children remaining under the paternal power. This was done by one of those fictitious or verbal distinctions invented by the prætors to promote justice, and the same contrivance was extended to numerous other cases. As the strict law deprived the emancipated child of a legal right of inheritance, the prætor could not openly and in terms annul this rule; judicial legislation does not proceed in this defiant way. As he could not make the emancipated child a technical heir, the magistrate declared him entitled to a possession of the goods (bonorum pos-

sessio), and as this right was supported by judicial intervention, although the name of heir was not bestowed, the privileges were. This device of *bonorum possessio* became a common means of conferring rights of property upon those who, by the arbitrary rules of the primitive law, were deprived of them.

§ 568. By the ancient law the descendants of daughters and of granddaughters were not included with the descendants of sons, as the direct heirs of the deceased. The Emperors Valentinian, Theodosius, and Arcadius, abolished this distinction, but at the same time directed that the shares in the inheritance of these descendants in the female line should be somewhat less than those of the heirs in the male line.

§ 569. When there were no direct descendants, or those whom the prætor regarded as such, the ancient law declared the next class of persons to whom the inheritance should fall, to be the agnats, or collateral relations of the intestate on the male side, among which would be brothers, uncles, and cousins on the father's side. Thus there were many degrees of agnation, but the right of inheritance did not belong to all, but to those only who were in the nearest degree. If the deceased left brothers, they would succeed to the estate to the exclusion of uncles, cousins, and all other remoter degrees of consanguinity. The ancient rules of preference for males was effectually broken down by the prætors and the imperial constitutions, and shares in the inheritance, under the name of possession of the goods, were given to females collaterally related to the deceased on the father's side, as sisters, aunts, and cousins. Thus the mother was allowed to share in the estates of her children. Many special rules were adopted, regulating the order of succession among these collateral relations, but it is not necessary, for the purposes of this work, to enter upon this detail.

§ 570. When there were no relations of the two former classes, no direct descendants, and no collaterals related

through the father of the intestate, or agnats, then those collaterals related through the mother, or cognats, were called to the succession, in the order of their proximity.

§ 571. The rules defining the various degrees of consanguinity were very minute and particular. Starting from a given individual, there were three kinds or classes of relationship to him; the ascending, which included parents, grandparents, and other ascendants; the descending, which included children, grandchildren, and other descendants; and the collateral, which included brothers and sisters, uncles and aunts, cousins, and the like. In these classes of relationship there were various grades. The first grade of relations to an individual included his father and mother, sons and daughters; the second grade embraced his grandparents and grandchildren, and brothers and sisters; the third degree of consanguinity included his great grandparents and great grandchildren, the brothers and sisters of his father and mother, or uncles and aunts, and the children of his brothers and sisters, or nephews and nieces.

§ 572. These rules, which make the grandparent and grandchild in the same degree of relationship to an individual as his own brothers and sisters, and which are therefore so different from our own, require some explanation. By the Roman law, the Canon law, or that introduced by the church, and the English and American law, the degrees of relationship in the direct ascending and descending lines are reckoned in the same way. Thus, commencing with the individual, each remove among ancestors or descendants, constitutes one degree. This is natural and universal. In counting the degrees of relationship between an individual and persons in collateral lines, such as brothers, uncles, cousins, the Roman law also commenced at the individual in question, reckoned up the ascending line step by step, until it came to the common ancestor of himself and his relation in the collateral line, and then down that line, until it came to that relative. Thus, to determine the degree of

consanguinity between a man and his brother or sister, the law commenced with the individual, and counted one step up to the father, and then one more down to the brother, making brothers and sisters two degrees removed from each other. The degree of consanguinity between an individual and his uncle and aunt, was thus estimated: commencing with himself, the grandfather, their common ancestor, was two degrees removed, and from the latter to his son, the uncle in question, was one more step, making three in all. The relationship between an individual and his nephews and nieces was determined in the same way; from him to his father was one degree, and from that father to his son, and again to his children, the nephews or nieces in question, were two additional steps. The Roman law thus commenced its count in all cases at the same point. The Canon law of the Church of Rome, and after it the common law of England and America, in estimating the degrees between collaterals, commenced at the common ancestor of the individual and his relative in question, and counted down either one of these lines if they were equal, and the longer one, if they were unequal. Thus the relationship between brothers and sisters is the first degree; because, commencing with the common ancestor, the father, and counting down either line, one step brings us to either brother or sister. The relationship between an individual and his uncle or aunt is in the second degree; because, commencing with the individual's grandfather, the common ancestor of the two relations, and counting down the longer line, after two removes, we come to the individual in question. The relationship between an individual and his nephew or niece is also of the second degree; for, commencing with the common ancestor, the individual's father, and counting down the longer line, in two steps we come to the nephew or niece in question. This distinction between the methods of the Roman law and of the Canon law, in estimating the consanguinity between persons collaterally related, is, I hope, sufficiently

clear. The rule here stated will easily indicate how other degrees were reckoned.

§ 573. 3. *Succession to an entire Estate by Adrogation.*—This took place when a person of full age, and not under another's power, having property, caused himself to be adopted by another. The adoptor took all the estate, and became liable for the debts.

§ 574. 4. *Succession by the Sale of a Debtor's Property.*—The fourth mode of acquiring the entire property of another was similar in its design to the operation of our bankrupt and insolvent laws. When a defendant was summoned to appear in court, and he absconded or refused to appear, his creditors could make application to the magistrate to have his property sold. If the refusal to appear was persisted in, the application was granted, and after thirty days the entire estate was sold, upon the condition that the purchaser would pay one half of the defendant's debts. The purchaser thus succeeded to the debtor, became invested with his rights of property, and was subjected to the burden of one half his debts. Justinian altered this law, and ordered that creditors should apply to the prætor for a sale of the defaulting debtor's goods in such manner as would be most beneficial, either in parcels, or in one mass, and that the purchasers should only be liable for the price which they had bid, while the total proceeds should be divided among the creditors, toward discharging their several claims. This enactment was virtually the same as the modern bankrupt and insolvent laws.

## *Third. Of Obligations.*

§ 575. The third grand division of the Roman law was that relating to obligations. In this were included those reciprocal rights and duties which arise among individuals by reason of their transactions with each other. An obligation was defined to be the bond of the law, by which a person

was obliged to make some payment, according to the laws of the country. It included only those perfected rights which were recognized by the law, and could be enforced in the tribunals, and not mere moral obligations which had not been stamped with a legal sanction. Some of these obligations arose from the provisions of the strict civil law, others sprang from the prætorian legislation. In fact, it is in this department of the Roman jurisprudence that we most plainly see the work of the prætors in modifying and adding to the severe and meagre requirements of the primitive law.

Obligations were divided into four classes; those arising from express contract (ex contractu); those arising from implied contracts (quasi ex contractu); those arising from actual wrongs (ex maleficio); and those arising from constructive wrongs (quasi ex maleficio).

§ 576. I. Obligations arising from Contracts.—There were four divisions of these obligations: 1. Contracts perfected by the thing (re), which was the subject matter of the agreement, or real contracts; 2. Those arising from words (verbis), or verbal contracts; 3. Those committed to writing (litteris); 4. Those arising from the consent of the parties alone. These will be considered in order.

§ 577. 1. *Real Contracts.*—A real contract depended upon two elements; the agreement or consent of the parties, and the actual transfer of the thing which was the subject matter of the bargain, from one to the other. The class included several species.

*Mutuum or Loan* arose when anything having weight, number, or measure, had been delivered by the owner to another, with the understanding that, not the identical article, but others of the same nature and value, should be returned. In this transaction the thing loaned, such as money, corn, wine, became the property of the receiver for him to use as he saw fit, but the obligation rested upon him to re-

store another of the same kind, amount, and value to the lender. As the property passed to the borrower, if the thing became accidentally destroyed without his fault, he was still not freed from the duty of restoring it. Upon failure to make return at the time agreed upon, the lender could enforce the obligation by an action, which was recognized by the primitive law.

§ 578. *Commodatum*, another of these real contracts, was the gratuitous loan of an article, with the understanding that the identical thing was to be restored at the expiration of the stipulated time. In this contract the property did not pass to the recipient. As the transaction was entirely for the borrower's benefit, he was liable to the owner not only for the loss of the thing through his own fraud, but even through his slightest negligence; he was bound to use toward it the utmost care and diligence.

§ 579. *Depositum.*—The contract of deposit arose when one entrusted an article with another for gratuitous safe-keeping, until it should be demanded back again. The obligation rested upon the depositary to make restitution of the very thing when it was called for. As this contract was made entirely for the benefit of the depositor, a loss of the article did not fall upon the receiver if he took the same care of it which he did of his own property, but he was liable for a loss occasioned by fraud.

§ 580. *Pignus, or Pledge.*—This contract arose when a debtor deposited an article with his creditor as security for the payment of the debt. The obligation rested upon the receiver to restore the identical thing when the claim was satisfied, but the pledger could not claim and recover it back until he had discharged the debt. This species of contract was one of benefit to both parties, and therefore required diligence on the part of the creditor in keeping the thing pledged; but if it were injured or destroyed by accident, he was not answerable for its value.

The three latter contracts, *commodatum*, *depositum* and

pledge, with their general incidents, have been borrowed from the Roman and incorporated into the English and American law, and, with some others to be described, form a class technically known as bailments.

§ 581. 2. *Contracts arising from Words.*—A verbal contract was made in the form of question and answer, and was technically known as a stipulation. This form of a question put by one contracting party, and an answer from the other, was common, and extended back, as we have seen, to the earliest stages of the Roman law. A verbal promise given without the formal interrogatory was considered as *nudum pactum*, and gave rise to no obligation which the law recognized. Anciently, the use of particular words was necessary, such as *spondes? spondeo; promittes? promitto; fide-promittes? fide-promitto; dabis? dabo; facies? faciam.* But the later constitutions did away with the necessity of these sacramental words, and only required the understanding and consent of each party, expressed by any language.

§ 582. Some stipulations were to be performed immediately; others at a certain future day; and the performance of others was made to depend upon a condition. Not only the delivery of things, or payment of money, but the performance of specified acts, could be made the subject of stipulations. In the latter case it was common to introduce a penalty to be borne by the party who neglected to do the act agreed upon. Thus the stipulation would require the person to do a certain act, or to pay a definite sum of money in case of failure. When the person died in whose favor the agreement was made, the rights under it passed to his heir.

§ 583. These particular forms of contract were entered into under various circumstances; some were the voluntary engagements of the parties; others were imposed by judges or magistrates, as when security was ordered to be given against fraud, or against apprehended damage.

§ 584. Stipulations were void when they related to ob-

jects not in existence, or to things which could not be the objects of private property; or if they engaged that a third person should give or do something; or if the party to whom the question was put did not answer it pertinently and directly; or if they were made between a person and another under his power, or by a deaf and dumb person, or a madman, or by a pupil without the consent of his tutor; or if their performance depended upon an impossible condition. If a person acknowledged in a written instrument that he had entered into an obligation by promise, it would be presumed that the promise was regularly made in the form of a stipulation.

§ 585. Sometimes other persons bound themselves for the principal promiser, and were then called *fide-jussores*, or sureties. Sureties might be taken for the performance of any kind of contract. When there were several sureties, each was bound for the whole debt, and the creditor could demand it from any of them. By a late constitution, however, the creditor might be compelled to demand and recover a proportional part from each solvent surety. The obligation of the surety could not be greater, though it might be less, than that of the principal debtor. When a surety had been obliged to pay money for his principal, he had a right to recover it back from him by an action appropriate for that purpose.

§ 586. 3. *Contracts in Writing.*—The name explains the character of this class of contracts. The only peculiarity noticed in regard to them was, that if a man had acknowledged in writing that he owed what in reality he had never received and did not owe, he was not permitted to set up the truth as a defence after two years; should this time have elapsed he was absolutely bound by his confession.

§ 587. 4. *Contracts founded upon mere Consent.* This class of contracts was very extensive, and it entered into all the ordinary business and affairs of life. It included purchase and sale, letting and hiring, partnership, and agency

or mandate These contracts were said to be founded on consent, because neither writing, nor the technical form of stipulation, was necessary to their validity; indeed, the parties themselves need not have been mutually present when the agreement was consummated. In entering into them, the parties were bound to do what was just and right, and the extent of this obligation the law defined.

§ 588. *Purchase and Sale.*—This contract was completed as soon as the price was agreed upon, although it had not been paid. But when the agreement was to be in writing, it was not absolute until the writings were made and signed. The price must be money, and certain in amount, for if it were only some other article, the exchange would be a mere barter, and not a sale. As soon as the price was agreed upon, unless the contract were in writing, the thing sold was at the risk of the buyer, although not yet delivered, and if the article should be destroyed, the loss would fall on him, but if, on the other hand, the thing should increase in value, the gain would be his.

§ 589. *Letting and Hiring.*—This contract was quite similar to purchase and sale, and was governed by the same rules. It was completed as soon as the amount of the hire was agreed upon. Both the letter and the hirer could enforce the obligation against the other for any breach of the contract. To constitute the agreement technically one of letting and hiring, the hire should be certain in amount; but if it were not, as if, for example, a man should send his clothes to a tailor to be mended without any definite understanding as to the price, either party could sue the other for any failure of duty, by one of those equitable actions invented by the prætors, called actions *præscriptis verbis*, which were adapted to the circumstances of each particular case, without reference to any well-known formulas.

§ 590. One species of letting and hiring related entirely to lands, and was called *emphyteusis*. This took place when the owner of lands let them to a tenant for ever, upon con-

dition that if a certain yearly rent be paid, the proprietor or his heirs could not take them away from the tenant or his heirs, or from any person to whom they had been sold. This method of transferring landed property was somewhat common in the provinces. Of course, the tenant could sell his estate or devise it by will, and in whosesoever hands it might be, it would be encumbered with the annual rent. A person acquainted with the internal policy of the State of New York, will recognize the similarity between these Roman species of estates, and those common in the old manors near the Hudson river, which have occasioned so much legal controversy and even violence. In these latter the lands were originally conveyed to the tenants and their heirs for ever, on condition that an annual rent was paid to the landlord.

§ 591. It was often a matter of difficulty to decide whether a transaction gave rise to the contract of sale, or that of hiring. If a person should employ a goldsmith to make a number of rings and to furnish the gold, this would be a contract of sale; but if he should furnish the gold himself, and agree to pay the smith for his workmanship, this would be a hiring.

The hirer was bound to use the same care and diligence with the thing hired, that he would with his own property.

§ 592. *Partnership.*—Contracts of partnership were formed for the same purpose as at the present day, and were either general or special. General partnership comprised all the business transactions of the parties, and involved an entire community of all their goods. Special partnerships were entered into to carry on some single species of commerce. When no special agreement was made, the partners shared the profits and losses equally, but it was possible for them to make any arrangement they pleased in reference to furnishing the capital and participating in the gains. A partnership might be dissolved by the withdrawal of any partner at will. It was ended, also, by the death

of a partner; by the completion of the business for which it was formed; by the public sale or confiscation of all the property of a partner; and by the giving up by a partner of all his goods, to be sold for his debts. A partner was bound to use the same care and diligence with respect to the common property that he used with his own.

§ 593. *Mandatum.*—A mandate was the contract which arose when one person committed some trust or business to another, to be undertaken and discharged gratuitously, and the latter accepted the commission. The agent, in such a case, was bound to fulfil his instructions accurately, and the employer or mandator was bound to ratify all that was done within the scope of his directions. Mandates were divided into five kinds: those solely for the benefit of the employer; those jointly for his benefit and that of the agent; those solely for the benefit of a third person; those jointly for the benefit of the employer and the third person; and those jointly for the benefit of the agent and a third person. A mandate might be revoked by the employer at his pleasure before any act had been done under it. It was ended by the death of either party; but if the agent, in ignorance of the principal's death, should do anything pursuant to his instructions, the representative of the principal was bound thereby.

§ 594. II. Obligations arising Quasi ex Contractu, or from Implied Contracts.—The following are examples of these obligations. When one person not specially directed or commanded undertook to transact the business of another who was absent, each was bound to the other by an implied contract; the agent to use the utmost diligence and faithfulness in the performance of his duties; and the principal to reimburse the agent for necessary expenditure.

The mutual obligations of tutors and pupils toward each other were also considered as based upon an implied contract.

When lands were owned in common by two or more

persons not partners, such as heirs, the obligation resting upon them to divide the fruits and profits and expenses, belonged to this class, as did also the duty of an heir to deliver a legacy to a legatee.

When a debt not due had been paid to a person by mistake, he was bound by an implied contract to refund it.

§ 595. III. Of the methods by which Obligations arising from Express or Implied Contracts might be satisfied and discharged.—These might be satisfied and discharged,

1st. By payment of the amount due, whether by the debtor himself or by another. The payment by the debtor also discharged his sureties.

2d. By Acceptilation. This was an imaginary payment, and took place when the creditor was willing to remit the debt. It was in form a stipulation. The debtor asked the creditor, "Do you consider what I promised you as accepted and received by you?" The creditor replied, "I do." Under this form any species of contract might be discharged, whether for the payment of money or the performance of any act, for all contracts could be reduced to the form of a verbal stipulation, and afterward remitted.

3d. By Novation. When the creditor took a new security for debt from another person, the original contract, by the law before Justinian, was discharged by novation. So a new stipulation taken from the debtor himself, which added anything to the old contract, discharged it. Justinian altered the law, by declaring that novation should only have effect to destroy the original obligation when the parties had so expressly agreed.

Finally, obligations arising upon contracts might be dissolved by mutual consent of the parties.

§ 596. IV. Obligations arising ex Maleficio.—Of these there were three classes; *Furtum*, or Theft; *Damnum*, or Damage; and *Injuria*, or Injury.

*Furtum.*—Theft was the wrongful, secret taking of another's property, with a view to gain, and with the intent to steal. Thefts were manifest, if the person was taken in the act of thieving, or in the place where he committed the crime, or when seen in possession of the stolen article. All other thefts were not manifest. Persons who knowingly received and concealed stolen goods, and those who aided them, were also liable as thieves. The penalty of committing a manifest theft was quadruple the value of the thing stolen, and of a theft not manifest, double the value, in either case to be recovered from the thief in an action. This action might be brought by any person who had an interest in the safety of the thing stolen, even though he were not the owner. Robbery, or taking the property of another by force, was also considered as a species of theft, and gave rise to the same obligations.

§ 597. *Damnum*, or damage.—If a person through carelessness injured or destroyed the property of another, he was liable to the owner for the amount of the damage. The element of carelessness was necessary to give rise to the obligation to make reparation, and this was applied with nice discrimination to many particular cases. As examples: if a soldier exercising with his javelin, in a place appointed for that purpose, should accidentally kill a slave, he was not liable to the master; but if this happened in any other place, or by any other person than a soldier, the obligation arose. If a person felling the limb of a tree should chance to kill a slave, he was liable for his value, if it was done near a public road or path without any public warning; but if warning had been given, or the act was done in a field, away from the road, the liability to make reparation did not follow. A surgeon who, through want of care or skill, should kill a slave on whom he was attending, was answerable for his value.

§ 598. *Injuria*, or injury.—The injuries which gave rise to obligations that might be enforced by civil actions, were

numerous. Such were beating, wounding, slanders, libels, and attempts on the chastity of virtuous females. If the injury were done to a person under another's power, the latter might bring an action for reparation. Thus the husband or father might sue for an injury done to wife or child. When the injuries were accompanied by aggravating circumstances, the compensation was increased. Not only those who actually committed the injury, but those also who counselled or procured it to be done, were liable.

§ 599. V. Obligations arising Quasi ex Maleficio, or from Constructive Wrongs.—Certain acts not enumerated under the classes of strict wrongs, still gave rise to obligations in the nature of those *ex maleficio.* If a judge gave a wrong judgment through imprudence or want of skill, he was liable in an action to the party injured. So the occupant of a chamber from which anything had been thrown or spilled or hung, that caused damage, was liable. The master of a ship or tavern was liable for any damage or theft done by his servants. These examples will serve to illustrate this class of obligations.

### THE ROMAN LAW DURING THE MIDDLE AGES, AND ITS CONNECTION WITH MODERN JURISPRUDENCE.

§ 600. The body of law of which I have just given a mere outline, had been extended over all the provinces of the empire, and had effectually supplanted the customs and legislation of the conquered nations. In Gaul the transformation had been complete; the Roman manners and language had been universally adopted. The western empire, however, had sunk under the attacks of the Germans before the Emperor Justinian collected the law and published it in a codified form for the eastern. Gaul, Spain, Britain, and Italy passed from under the Roman dominion into that of the rude barbarians, but still an element of the imperial civilization was left, which, never entirely crushed,

possessed life enough to maintain its continued existence, and finally to assert an equality, at least, with the national forces of the Germans.

§ 601. When the power of the German peoples had become complete over Italy and the provinces of Gaul and Spain, the invaders did not destroy the Romans, nor absorb them into their own numbers, nor impose upon them a new law. Each race, living side by side on the same soil, preserved, and yielded obedience to, its own laws, which were thus no longer territorial, as coextensive with the limits of a specified territory, and governing all the inhabitants thereof, but "personal," as they applied to different classes of persons dwelling in the same country. Thus, within the limits of the Frankish, or other Germanic dominions, there existed simultaneously, at least two, and sometimes more, different sets of laws. According to the general rule, each person was subjected to the law of his birth, Roman to Roman, Frank to Frankish, or Burgundian to Burgundian. Upon marriage, the wife passed under that of her husband, and if she became a widow, she reverted to that of her own nation. Ecclesiastics, however, were under the Roman law, whatever might have been their nationality. In judicial trials, originally, the personal law of the defendant furnished the rule by which the controversy was decided, but this was afterward altered. The law of a person who died intestate regulated the distribution of his property. Marriages were contracted according to the law of the husband, and those which had followed that of the wife could be annulled, until the church interposed and ordered otherwise, on religious grounds. Thus there existed, in the time immediately succeeding the subjugation of the provinces, side by side, the Roman and the barbarian legislation, each applying to a portion of the population, each equally powerful over those who owed it allegiance, each equally a law in the state.

§ 602. Such a condition of internal policy could not exist after the people began to make any considerable advance in

civilization, and to become assimilated and homogeneous. When one race or nation was predominant, its ideas and legislation must finally attain the supremacy. Thus, in the north of France, the Romans were comparatively few; the Franks were greatly the superior in numbers, and, as a consequence, when the different peoples became thoroughly united into one, their common jurisprudence was formed rather on the German than the Roman type. In the middle and south of France, however, the Romans were the most numerous, and when society had become settled, the Roman ideas were taken as the basis of their legislation. This distinction was preserved until modern times, and even to the adoption of the code civil under Napoleon I., and the two sections of the kingdom were known, the former as *pays du droit coutumier*, and the latter as *pays du droit écrit.*

§ 603. We can now plainly see why the Roman law did not exert the influence in shaping the early legislation of England, which it did on the continent. The Saxon invaders found but slight remains of the Roman policy and jurisprudence; whatever still existed was confined to the municipal organization of a very few towns. With them there was no "personal" law; all was territorial. The Saxon customs prevailed, to the exclusion of all others, throughout the kingdom. The Roman was not left side by side with the other, to grow up with it from roots sunk deep in the soil. Whenever any portion of it was adopted, it was imported from abroad, as something foreign to the national policy.

§ 604. While the private law of the Romans was thus preserved in the new continental kingdoms formed out of the old provinces, some of their public or political institutions were also suffered to remain, with little modifications. This was particularly true of the municipal organizations, the internal policy, government, and rights of towns and cities. The cities were a most important element in the

Roman civilization, and those of the provinces bore a general resemblance to each other in organization, while some possessed the superior privileges which belonged to the soil of Italy. With these towns the Germanic invaders did not at first interfere; their habits and feelings were strongly opposed to the life of a citizen. The cities of France, and especially of Italy, thus preserving many of their ancient rights, became the nuclei for the spread of ideas political and legal, entirely antagonistic, at first to the primitive Germanic, and subsequently to the feudal policy. Indeed, Savigny shows that the Italian republics of the middle ages were the continuation and development of the ancient order of things preserved through the municipalities from the time of the empire itself, and were not new creations.

§ 605. When the barbarians effected a permanent settlement on the ruins of the western empire, and made a distribution of the soil among themselves, large portions were nevertheless left in the quiet possession of the ancient owners. Among the Burgundians the whole territory was not seized *en masse*, but each separate Roman heritage was allotted to a Burgundian, and so divided that the new proprietor received one half of the gardens and courtyards, two thirds of the tilled and farm lands, and one half of the slaves. Among the Visigoths, the Romans yielded two thirds of the lands. Among the Lombards and the Franks, the same distribution took place, but the respective shares which were awarded to each race do not clearly appear.

§ 606. The causes which thus united to preserve the Roman law alive in the bosom of conquering nationalities, the sufferance of it as a "personal law" for those born under its jurisdiction, the preservation of much of the ancient provincial and Italian municipal organizations, and the leaving a portion of the landed property in the hands of the original occupants, which prevented them from sinking into a condition of dependency, were strictly historical. By these means this jurisprudence still had a foothold on

the soil; it had a people to govern, with whose public and domestic life it had become inseparably intertwined; it was no new and foreign element, but represented one large and influential portion of the population, as the ruder German customs and codes represented the other, which, though dominant, was inferior in everything except physical force and manly virtues. The two systems were then at liberty to develop, and to contribute toward the formation of new kingdoms and nations, in a measure commensurate with their relative merits. When, after the lapse of generations, the two races had become assimilated and united into one people, it was found that the old organizing power of the Roman had still asserted its supremacy. In France, Spain, and Italy, the language had been cast in a Roman mould, and the jurisprudence had followed the Roman type.

§ 607. Thus far the effect had been that of the natural, inevitable, and unconscious development of society. But the study and teaching of the Roman jurisprudence as a science, hastened its progress in acquiring power, and made its triumph complete. This began at Bologna in the twelfth century. A flourishing school then arose, whose reputation soon extended across the Alps. A crowd of students from all parts of Europe carried to their own countries the new-born science, propagated it by their writings, and especially taught it in their universities. The Lombard cities, in whose midst the new school arose, had already attained a high degree of wealth, population, and power. The life which animated their commerce and business demanded a law much developed. The legislation of the Germans did not respond to their need, and they were led to the careful study of the compilations in which was contained the wealth of the Roman jurisprudence. There they found a system complete, comprehensive, and minute, adapted to a people engaged in commerce, with rules eminently practical, and at the same time consistent, philosophical, and just. Thus the study revived; numerous schools sprang up over Eu-

rope; commentators upon the digests of Justinian were multiplied. The judges, for the most part formed and educated under these influences, reproduced in their judgments the principles which they had been taught, and in time the Roman jurisprudence became the common law of Europe, underlying all the separate national systems.

§ 608. The most gorgeous of pageants, and the most highly symbolic of all national acts, was a Roman triumph. The laurel-crowned and purple-robed general, leading his fierce and compact legions fresh from bloody battle fields, and followed by long trains of illustrious or even royal captives, and by rich spoils of war, as he moved slowly along the Sacred Way, past smoking altars, and through vast crowds of the populace which poured out to meet him with their intoxicating shouts of *Io triumphe*, was the living exponent of Rome's material power—a power which never rested until the world was at her feet. As the magnificent and solemn procession swept up to the temple of the Capitoline Jove, there went with it the ideas of universal dominion, of uninterrupted success; there was embodied in it the thought of Rome mistress of all nations.

§ 609. But the togaed prætor on his judgment seat, was the exponent of a deeper, wider, more vital force; a force which penetrated beyond the reach of armies, and conquered when those armies were overthrown. He represented the Roman intellectual power, the genius for organization, the ideas of order, of civilization, of right and justice. He created a jurisprudence which followed close upon the advancing limits of empire, destroying old national systems, and making a people's subjugation complete. He has left a work whose effect on the world's civilization has far surpassed that of Greek philosophy and literature, or of Roman conquest. Indeed, his life is prolonged to our own times. The Roman empire has crumbled, the forum is deserted, but the Roman prætor has ascended the judicial tribunals of all modern nations. He sits by the side of the English

chancellor; his spirit animates the decisions of British and American judges; he speaks with Holt, and Mansfield, and Stowell, with Kent, and Story. His influence will never cease while nations are impelled by sentiments of justice and equity, and their laws are formed upon a basis of practical morality.

## CHAPTER IV.

### THE MARITIME CODES OF THE MIDDLE AGES.

§ 610. THAT portion of our municipal law which regulates the various transactions of commerce and trade, and which is sometimes called the Law Merchant, deserves a special mention. When we compare the jurisprudence of England and of our own country with that of other maritime and commercial nations, we shall find a marked resemblance among them all, in that department which refers directly to the operations of business. The reasons of this general likeness are to be found in the nature of the subject matter of these laws, and in their origin. The transactions of trade and commerce are not confined within the limits of any one state, but are necessarily international; and it would be in the highest degree injurious to the prosperity of business and the interests of merchants, if the laws which govern this widely extended intercourse, were stamped with a local character, and were greatly variant in different countries. The anxiety which the courts and legislators of any particular state have over the welfare of their own citizens and countrymen, has therefore produced, and will continue to produce, an agreement in the special rules embraced in this department of municipal law. Another reason for this general resemblance is to be found in the fact that mercantile law does not rest upon the national institutions and customs of any particular country as its

origin. It grew up by degrees from practices common to all commercial countries, and extended over the entire civilized world. It has no arbitrary forms moulding its whole subsequent growth, and no connection with the ethnic or tribal characteristics of any people. Its rules are based upon equity and good faith, and therefore derived from that natural law which is only the instinct of right and justice planted in the human breast.

§ 611. It must not be supposed that the mercantile law in England and America is any code or department by itself, separated from the rest of the national jurisprudence; on the contrary, it is an integral part of the whole system, intimately connected with it by dependent relations and common principles. The development of this branch of our municipal law affords one of the most striking and instructive examples of the creative functions of the courts, for to them, with some assistance and modifications afforded by statutes, is due the existence of the whole as a portion of our positive legislation. That mercantile customs, or usages among merchants, existed in England prior to their recognition and adoption by the judges, is true, and that business men governed their transactions by these customs is equally true. But as commerce and trade increased in importance, it became necessary for the courts to consider the questions involved in these mercantile relations, and to investigate the usages of mercantile men; and it was only when this had been done, and these usages had been recognized, adopted, and enforced by the judiciary, that they passed into the domain of actual law, having force and efficacy throughout the kingdom. The courts at the outset were reluctant to assume and act under this power, and their progress was slow, but the result has been final and complete, so that the system of regulations styled the Law Merchant, is as much a part of the general law of the land, as that which relates to real property or to personal rights.

§ 612. The department of mercantile law in our own

and all other commercial countries, includes a large number of most important subjects, as it embraces among others those relating to shipping, and the navigation of the ocean, to mercantile paper, or bills of exchange and promissory notes, and other contracts which have the peculiar character of negotiability, to the contract of sale, to partnership, to agency, to bailment, and to insurance.

§ 613. The fundamental principles, and many of the special rules, of some of these branches of the law merchant, are drawn in whole or in part from the Roman jurisprudence, although great additions and modifications have been made, as commerce and trade have increased to an extent unknown in the Roman empire. Other portions, and especially those relating to shipping and navigation, and to negotiable paper, took their origin at a time subsequent to the completion of the Roman law in the codes of Justinian, or from a source independent of that system, although in the development of their special rules the influence of Roman legislation has been strongly felt.

§ 614. In the preceding chapters upon the feudal system and upon the Roman law, we have seen that while the barbarian conquest swept over the whole of western Europe, subverting most of the old civilization, and erecting upon its ruins the massive and severe structure of feudalism, which, in its essential principles, was antagonistic to all commerce and intercommunication, there were still left scattered through the ancient provinces and districts of the empire, some important cities which preserved much of their old municipal institutions, and which, in connection with other towns of a later growth, became in time the nuclei of a new life and spirit destructive of the feudal policy. It is not within the design and scope of this work to trace the history of these cities. It is sufficient to say that during the 11th, 12th, and subsequent centuries, many of them became the centres of an extensive commerce, and grew to be independent and flourishing republics, rich in

material wealth, and the homes of art, literature, and refinement. On the shores of the Mediterranean were the cities of Amalphi, Venice, Pisa, Genoa, Marseilles, Barcelona, and many others, whose commerce reached as far as the navigation of the times would permit, and afforded them that wealth which gave power, influence, and culture, but which at last brought destruction upon them. On the shores and tributaries of the Baltic Sea, the German and the Atlantic oceans, were the cities of Wisby, Lubec, Hamburg, Bremen, Ghent, Cologne, which became the seats of an extensive trade with England, and with the interior and south of Europe.

§ 615. A commerce so extensive, unprovided for as it was by any of the existing systems of law of the European states, must create for itself customs which would at first serve as guides to merchants and mariners; and these customs, through some process of legislation, must finally be transformed into the condition of positive law in the several states and countries where trade was flourishing and important. It was in this manner that the maritime codes of the middle ages grew up. The same had been done previous to the downfall of the Roman empire. The Rhodians, who were distinguished for the extent of their commerce, had promulgated a distinctive code of sea laws, which attained a position of authority along the shores of the Mediterranean. It was referred to in some of the Roman imperial constitutions as having binding force, and although as a whole it has been lost, some portions are preserved in the pandects of Justinian.

§ 616. The law of shipping and navigation was, however, but little developed among the Romans, and we must look to these leading cities of the middle ages for the commencement of that growth which has steadily continued to the present day. The earliest of these cities or states which collected the sea customs into a definite form of actual legislation, was the republic of Amalphi; but its prosperity as

a trading town, and its independence as a state, were destroyed about the middle of the twelfth century, and its legislation was displaced by the more extended and widely adopted code which soon followed.

§ 617. The commercial usages of the various trading cities on the Mediterranean Sea, resembling each other from the very necessity of the case, were collected into a written code about the middle of the thirteenth century, and called *Il Consulato del Mare.* The immediate origin of this celebrated compilation is involved in much obscurity. Some writers have ascribed it to the city of Barcelona, while others have claimed the city of Pisa, and still others, Venice, as its birthplace. It is probable, however, that it was the accumulation of the local customs and legislation of several towns, gradually made through a considerable lapse of time, but finally systematized and promulgated in its present form, either at Pisa or Barcelona. It was certainly adopted by France and the Italian republics, and attained the character of law in the countries bordering on the Mediterranean Sea. This collection contains regulations for the government of trading vessels in time of peace, and of neutral and belligerent vessels in time of war. It has exerted a very powerful influence on the whole maritime legislation which has succeeded it, and, in fact, that law in all European countries is confessedly based upon it, and is, in general, conformable with its provisions.

§ 618. The commerce of the cities bordering on the northern seas, carried on as it was for a while in great part independently of the trade of the south, gave rise to customs and usages among the merchants of those regions, which, by a like necessity, were at length reduced to a positive form, and promulgated in written codes or collections. The earliest of these compilations is known as the Laws of Oleron, and has been ascribed to a French, and to an English origin, but is now universally attributed to the French. The small island of Oleron on the northern coast of France

possessed a flourishing commerce, and it was here that this code was first published, and was thence soon introduced into England by Richard I. It had a general agreement with the *Consulato del Mare*, was received as common law in France, attained nearly the same authority in England, and was soon after adopted in Spain. It was made the basis of subsequent collections and codes, and forms another of the foundation stones of the whole structure of modern maritime law. It treats of the duties of masters and seamen of ships, of the rights and duties of owners, of partial and total losses by perils of the sea, and of most or all of the important topics which are within the scope of the more detailed legislation of the present day. Although as a code it has no force in England and America, any more than the compilations of Justinian, yet its rules have been incorporated by the courts into our own law, and it is even now referred to and cited by the judges in illustration or explanation of their decisions.

§ 619. Another compilation of sea laws was made about the year 1290, at the city of Wisbuy on the Baltic, and is known as the laws of Wisbuy. This city was a free republic, and was distinguished for its wealth and luxury, for the splendor of its buildings, and the sumptuous living of its leading merchants. These laws bear a striking resemblance to those of Oleron, and some portions seem to have been transferred directly from the one code to the other.

§ 620. A third of the ancient maritime codes of northern Europe was that promulgated by the cities of the Hanseatic confederation in 1614. In this confederacy were included Lubec, Bremen, Hamburg, and all the principal cities on the Baltic, and navigable rivers of Germany, united together for mutual protection and for the furtherance of their commercial interests. Their compilation, which, of course, had the effect of positive law among them, was mainly copied from the laws of Oleron.

§ 621. These several codes form the basis of that portion

of the modern law merchant, which particularly refers to shipping, to the navigation of the ocean, and to purely maritime contracts. It is not my purpose to give the substance of this early legislation, for as it constitutes a considerable portion of our law of the present day, it will more properly be described in the subsequent part of this work. It must be noticed that while the commerce of England was, at a very early period, so extensive as to reach to the Baltic, the German Ocean, and even to the Mediterranean Sea, although it had not attained the magnitude of that of the Italian republics during the height of their splendor and opulence, yet that country has furnished no special collection of sea laws. But we have already learned enough of the genius for legislation of our English ancestors, to perceive that it was not in accordance with their methods to collect and compile any such distinctive system. Their common law, never stationary, had the power to avail itself of the wisdom and experience of all other countries, and to draw in the foreign material and incorporate it with their own. Thus, while our law is distinctively English and American in its form, and has force as law only because it has been called into being in some of the methods prescribed by our institutions, yet for the origin in history of this particular department, we must look to the rich Italian republics of the twelfth and thirteenth centuries, to the merchants of Oleron on the coast of France, and to the enlightened citizens of Wisbuy on the Baltic.

# PART III.

## OUTLINES OF AMERICAN MUNICIPAL LAW.

## CHAPTER I.

### PERSONS AND PERSONAL RIGHTS.

§ 622. In following out my plan, and giving an outline of the municipal law, of which the principal features are the same in England and the United States, I shall treat, in the first place, of persons, and of those rights belonging to them, which are the objects of legal supervision. The national law regards and treats persons only as individuals forming a part of the state; it pays no attention whatever to those natural rights which theorists may consider as incident to a condition prior to an organized political society. It sees the whole nation as a body politic, and the separate individuals composing it, and awards to the latter all those rights which are deemed compatible with the safety and prosperity of the whole. How general or how limited will be this concession of privileges to the individual, will depend in great measure upon the political organization, upon the ideas of social order which underlie the government. In our own country the theory is, that all power of government as a practical institution, is derived from the people themselves. This theory does not necessarily deny that the ultimate abstract right to govern at all, has its source in the

Divine Governor of the Universe. Understood rightly, it only assumes that the people have the practical power to determine the form and limitations of the government, and the choice of rulers. As a natural consequence, the individual is regarded as having surrendered a part of his purely natural rights for the general welfare; and the amount of this concession is as small as possible, while the sum of those retained by him, and recognized and enforced by the municipal law, is a maximum.

§ 623. At the same time that our law admits and sustains a large class of personal rights, another class it passes by in silence. It does not interfere with the individual's rights and duties as a mere moral agent, as a creature of God, bound to obey the divine law in respect to the Creator, and in respect to other individuals united with him in the common brotherhood of mankind. It is only when an act has been done which affects a person's condition as a member of the state, that the municipal law interferes.

§ 624. The department of the law which we are considering, embraces,

Those rules which relate to the rights inherent in persons generally, as members of the state, or under its protection; and,

Those which define the condition and status of certain particular classes of persons, and their peculiar rights and duties.

## *Section First.*

### OF PERSONS GENERALLY, AND THE RIGHTS AND DUTIES BELONGING TO THEM.

§ 625. In its treatment of persons and personal rights generally, the state recognizes three classes.

The first class includes all free persons within the limits of the national territory, of every age and sex, whether native or foreign born, and whether permanent residents or

temporary sojourners. In this class are comprehended all others, and to it belong certain absolute rights, which the law recognizes and enforces.

The second class embraces citizens of the United States, or of a particular state, whether foreign or native born, of every age and sex.

The third class includes those citizens to whom the political power of the United States, or of a particular State, is directly confided, who may exercise the right of suffrage, and hold civil offices. These are, in most of the States, the male white citizens, of the age of twenty-one years.

## I.

### OF THE ABSOLUTE RIGHTS WHICH THE LAW RECOGNIZES AS BELONGING TO ALL PERSONS OF THE FIRST CLASS.

§ 626. These absolute rights may be comprehensively expressed, as the right of personal security, the right of personal liberty, the right to acquire and enjoy private property, and the right of religious belief and worship.

§ 627. The origin of these immunities we must seek in English history. Sprung from the tribal customs of the Germanic invaders, they have, from time to time, been asserted, fought for, conceded, and solemnly established. Their most important statutory or constitutional safeguard is found in Magna Charta. This celebrated instrument was extorted by his barons from King John in the year 1215, and has been ratified more than thirty times by succeeding monarchs. Magna Charta contains many special provisions touching the clergy and the nobility, which it is not necessary to enumerate. Its great constitutional features, which reach to our own times, and are the basis of personal and political security and freedom, are the following: that no aid or scutage (which answers to the modern tax) should be assessed except in three specified cases, without the authority of a great council summoned by the king; that merchants

should be allowed to transact all business, without being exposed to any arbitrary tolls and impositions; and that all freemen should be allowed to go out of the kingdom and return to it at pleasure; that the goods of every person should be disposed of according to his will; if he die intestate, that his heirs should succeed to them; that no officer of the crown should take any horses, carts, or wood without the consent of the owner; that the king's court of justice should be stationary, and should be open to every one, and justice should no longer be sold, or refused, or delayed; that no person should be put on trial from rumor or suspicion alone, but upon the evidence of lawful witnesses; that no freeman was to be taken, or imprisoned, or deprived of his property, or outlawed, or banished, or anyways hurt or injured, unless by the lawful judgment of his peers, or by the law of the land; every freeman was to be fined in proportion to his fault, and no fine was to be levied on him to his utter ruin.

The original text of the most important provision is as follows: *Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ.*

§ 628. It is worthy of notice that the provisions of the Great Charter are not expressed in those general terms which are common to modern constitutional legislation. Yet, special as they are, they have been invariably considered as expressive of comprehensive limitations upon the government, and declaratory of comprehensive rights of the people. The clause relating to the assessment of an escuage, has been definitely settled, with much contest, however, as determining that the parliamentary representatives of the nation hold a complete control over the subject of taxation. Indeed, this instrument has been fruitful of principles; at each great national emergency it has spoken in no uncertain voice. Sir James Mackintosh says of it: "It was a peculiar

advantage that the consequences of its principles were, if we may so speak, only discovered gradually and slowly. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required, and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly, so far only as the necessities of each case demanded. Its effect in these contests was not altogether unlike the grand process by which nature employs snows and frosts to cover her delicate germs, and to hinder them from rising above the earth till the atmosphere has acquired the mild and equal temperature which ensures them against blights. On the English nation, undoubtedly, the charter has contributed to bestow the union of establishment with improvement. To all mankind it set the first example of the progress of a great people for centuries, in blending their tumultuary democracy and haughty nobility with a fluctuating and vaguely limited monarchy, so as at length to form from these discordant materials the only form of free government which experience has shown to be reconcilable with widely extended dominions. Whoever, in any future age or yet unborn nation, may admire the felicity of the expedient which converted the power of taxation into the shield of liberty, by which discretionary and secret imprisonment was rendered impracticable, and portions of the people were trained to exercise a larger share of judicial power than ever was allotted to them in any other civilized state, in such a manner as to secure, instead of endangering public tranquillity; whoever exults at the spectacle of enlightened and independent assemblies which, under the eye of a well-informed nation, discuss and determine the laws and policy likely to make communities great and happy; whoever is capable of comprehending all the effects of such institutions, with all their possible improvements, upon the mind and genius of a people, is sacredly bound to speak

with reverential gratitude of the authors of the great charter. To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind. Her Bacons and Shakspeares, her Miltons and Newtons, with all the truth which they have revealed, and all the generous virtues which they have inspired, are of inferior value when compared with the subjection of men and their rulers to the principles of justice, if, indeed, it be not more true that these mighty spirits could not have been formed except under equal laws, nor roused to full activity, without the influence of that spirit which the great Charter breathed over their forefathers."

§ 629. The Petition of Right passed by Parliament in the year 1628, in the reign of Charles I., is another of the great constitutional muniments of the English people. In this statute, forced loans from the people, taxes without consent of Parliament, arbitrary arrests and imprisonments, the billeting of soldiers on private citizens, and trials and condemnations by martial law, were declared illegal, and condemned as subversive of the rights of the people and the fundamental law of the kingdom.

§ 630. A statute passed in the reign of Charles II. enlarged, or rather made effectual, the provisions of Magna Charta and the Petition of Right which protected personal liberty, by securing a certain and speedy method of enforcing them, and a remedy against their violation. This is known as the *Habeas Corpus* Act. It did not invent the Writ of *Habeas Corpus;* that form of judicial proceeding had been known for centuries; but it provided that no judge, under severe penalties, must refuse this writ to any person in custody who applied for it, in order that the cause of the confinement might be summarily inquired into, and, if found to be illegal, that the prisoner might be discharged. The importance of this statute, and of the remedy which it made absolutely certain, cannot be overestimated. Without it, the constitutional safeguards contained in the Great

Charter and the Petition of Right were only theoretical declarations; with it they can be speedily and effectively enforced.

§ 631. The Bill of Rights and Act of Settlement set forth by the Convention and Parliament at the commencement of the reign of William III., reassert the fundamental provisions of these former statutes, with some additional detail, and form the close of this series of great constitutional enactments, upon which the liberty and security of the English subject are based.

§ 632. The principles thus repeated by solemn affirmations of the legislature and the king are a part of the Common Law of England, and as such have been inherited by us. Indeed, the most important clauses of Magna Charta, those which protect private property, and secure personal liberty against aggression, were rather the residuum of Saxon institutions preserved in the memories of the people, than new statements of individual rights.

§ 633. The founders of our national Government, after having prosecuted a long war to maintain what they claimed to be their rights under the English constitution, were naturally zealous in preserving those rights in their own organic law. The Constitution of the United States is minute and specific in its safeguards against open or covert infringement of the personal rights of the people. Its provisions, which directly refer to this subject, are the following:

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." "No bill of attainder or *ex post facto* law shall be passed." "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration directed to be taken." "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." "The right of the people to keep and bear arms shall not be abridged." "No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." "The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise examined in any court of the United States than according to the rules of the Common Law." "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." "The enumeration in the

Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Most or all of the State constitutions also contain Bills of Rights similar to the foregoing. Having thus traced the history of these personal rights in the English law, and quoted the constitutional provisions of England and the United States for their protection, I will now proceed to describe them more in detail.

### 1. *The Right of Personal Security.*

§ 634. This includes security of life, of body and limb, and of reputation.

(1). *Security of Life.* The right to the full enjoyment of life is granted by the law of nature, and no system of municipal law could allow it to be taken by a private person unless in strongly exceptional cases. But our own organic law guards the life of an individual not only against the attacks of those not clothed with legal authority, but against the unwarrantable power of the state itself. The corner-stone of this muniment is the provision that no person shall be deprived of life, liberty, or property without due process of law, and this is further defined by the Constitution and the courts to consist in the following necessary elements: a presentment or indictment by a grand jury; an arrest by virtue of a warrant issued upon oath, and containing a description of the crime charged; information of the nature and causes of the accusation; a speedy trial before an impartial jury; a public examination of opposing witnesses; the forced attendance of the prisoner's own witnesses; the privilege of his own silence in respect to the charge, and freedom from a second trial after a conviction or acquittal by the first. The last provision, however, does not include the case of a conviction which has been set aside or reversed on account of some error committed on the trial; the criminal is still liable to a second trial.

This is "due process of law," nor can the United States, nor any particular State, take away from these bulwarks built up around the life of every person, even when it is put in danger on account of some alleged offence against the majesty of the state and the peace of society. The words "law of the land" used in Magna Charta, and "due process of law" employed in our Constitution, are identical in their import. They do not mean any law which the legislature may see fit to pass, but that common law course of judicial proceeding, known in England for centuries, and recognized and described by our organic law, and sketched above. Neither a State legislature, nor the national Congress, can, by enacting a new method of trial, thereby make it "the law of the land," or "due process of law."

§ 635. But the Constitution has not been content with thus prescribing the only manner in which human life can be taken by the state; it has gone further, and strengthened the barrier, by declaring that neither Congress nor the State legislatures shall have power to pass bills of attainder, or *ex post facto* laws. Bills of attainder are virtually legislative trials and condemnations. They are usurpations of the judicial function by Parliament; statutes passed without the formalities of witnesses, or evidence, or defence, by which an individual may be condemned unheard; and are of course utterly incompatible with the liberty of the people. *Ex post facto* laws are those which render persons guilty and liable to be punished for acts which, at the time of their commission, were not criminal.

§ 636. Human life is protected not only against public encroachments, but against private violence. This principle includes the right of self-defence. The individual is not left, for his only safeguard, to the fear of punishment which may deter the assailant; the law clothes him with the right to repel force by force, and to preserve his own, even at the expense of the other's life. It is not even necessary that one's life should be in actual danger to justify a homicide in

protecting it; the law only demands that there should be reasonable ground to apprehend a fatal result.

§ 637. The Common Law did not give any civil remedy to the surviving representatives of a person killed through carelessness or design, against the aggressor. By the technical rules of the English law the right of redress for violence done to the person belonged alone to the individual injured, and ended with his death. Late statutes, however in some of the States, have changed this rule, and given to the widow and children a right of action for compensation in pecuniary damages against the person who has taken the life of a husband or father.

§ 638. (2). *Security of Body and Limb.* The restraints upon the power of Government to take life, apply with equal force to any attempts to injure the body. But this is a danger not much to be apprehended in any civilized state in modern times. The use of torture, or maiming, or disfigurement, as a punishment, is so contrary to our ideas, that no law could be passed which would resort to them as punitive measures. The whipping-post, the stocks, the pillory, the branding iron, the rack, belong to the past; they are relics of barbarism. Still, for greater security, the fundamental law provides that cruel or unusual punishments shall not be inflicted.

§ 639. But we are all exposed to the violence of our fellows, and against this the law interposes its preventive and its compensatory remedies. The loss of a limb, or of those members which are useful in fighting, is denominated mayhem, and the right of defence against such an attempted outrage is allowed to the extent of taking the life of the assailant. Thus the municipal law, in respect to self-protection of life or limb, throws the individual back upon the simple law of nature, and permits him to be judge and executioner in his own case.

§ 640. But if violence has been successful, and limbs injured, or the body otherwise unwarrantably assailed, or

even threatened, the municipal law gives the sufferer a compensatory remedy against the aggressor, by means of an action to recover damages for the pain and injury to which he has been subjected. When this injury was direct, intentional, and effected by force, the ancient appropriate form of action was that described in Chapter II. of Part First, as *Trespass*, which was one of the very oldest known to the English law. But when the harm was "consequential," that is, done not through the direct and intentional application of force by the assailant, but rather accomplished as a consequence of his negligence, or of his being engaged in some other illegal act, the appropriate form of action was called trespass on the case. In both instances the compensation consists entirely of pecuniary damages, and the amount is to be fixed by the jury according to the circumstances of each particular case.

§ 641 (3). *Security of Character.* The law of England and of the American States, and probably of all other civilized countries, furnishes a protection for one's good name and reputation, by punishing in some manner those who cast aspersions on private character. While freedom of speech and of the press is guaranteed in our very constitutions, the abuse of this privilege is severely and justly repressed. A man's good name, reputation, and character, may be attacked by oral speech, and by written, printed, or pictured words or representations. Following this natural division, the law distinguishes two species of the offence, slander, and libel. Slander is the verbal attack on private character; in libel, the assault is more deliberate and formal and injurious, as it is committed through the agency of the press. As there is thus a difference in moral guilt of these two forms of the offence, so the law establishes a distinction in their legal guilt, or in their liability to punishment. The Common Law of England and of our own States, defines slander to consist in falsely and maliciously charging, by spoken words, that a person has committed

some public offence or crime; or that he has done something in reference to his particular trade or vocation, which, if true, would render him unworthy of employment; or in falsely and maliciously charging a person with any other thing, when, by means of the accusation, the injured party has suffered legal damage. By the rules of this law, as established by judicial decision, slander is somewhat restricted. All false, and even malicious verbal attacks upon another's good name, do not fall within the definition of slander. Those only do which produce such damage as the law can recognize and compute. Accusations which impute crime or evil practices in one's business, are conclusively presumed, without any proofs, to be followed by such damages; in all other cases the damage must be shown by proof. Thus, if the words complained of charge the commission of a criminal offence, they amount to slander, even though the attempt to injure character was harmless; but if the words only describe some moral delinquency, however great, but not amounting to a crime, or to a breach of public trust, or to malpractice in business, they are not legal slander, unless, as a direct consequence of them, some actual damage was sustained, beyond mere shame, and wounded feelings, and coldness of friends, and the contempt of the world. Thus, if I falsely accuse a man of theft, I am guilty of slander, and liable to an action; but if I circulate unfounded reports prejudicial to a woman's reputation for chastity, no matter how generally they may be believed, and how much mental agony she may suffer, I am not guilty of legal slander, so as to be liable to an action in her behalf, unless she has sustained some pecuniary, or what amounts to pecuniary damage, as the natural consequence of my falsehood and malice. Instances of such damage would be the breaking off, or prevention of marriage, the loss of employment, diminution of wages, and the like. This is the rule of the common law, and it is excessively harsh and inequitable. In some of the States the injustice

has been remedied by statute, and imputations upon female honor, at least, placed in the same rank as accusations of crime.

§ 642. A slander is purely a private injury, and its remedy is a private action for damages. As the foundation for the action is the wrong done to the individual, if the defendant can show that his accusation is true, the plaintiff cannot recover; the ground of complaint would have been removed; he would have suffered no wrong; the charge would not be slander.

§ 643. A libel is more comprehensive in its meaning than a slander. It is a malicious publication expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule. Language which, uttered verbally, would not amount to a slander, when written or printed and published, might be libellous. The law has, therefore, been generally more careful to restrain and punish an abuse of the freedom of the press, than a license in the use of the tongue.

§ 644. Libels may, like slanders, be treated as mere private wrongs, when the remedy is an action for damages, which is governed by the same rules as the one for slander, except that in no case is the plaintiff driven to prove any particular damage. The deliberate way of uttering the aspersions by print, and the chances for a wide-spread circulation of the falsehood, are considered as affording a conclusive presumption that a legal injury has been inflicted. Although theoretically these damages are considered as a recompense for the harm done to the plaintiff, yet practically it is almost or quite impossible to separate them entirely from the idea of punishment in the nature of fines inflicted on persons who have been guilty of a wrong only separated by a shadowy boundary from a crime. The same is true of the damages given in all instances when moral delinquency is inseparably connected with the existence of the legal

cause of action, such as assaults and batteries, seductions, and that large class of cases in which injury is done to person or property through negligence.

§ 645. As libels tend also to disturb the public peace, the law raises them above the scale of mere private wrongs, and ranks them among public offences, and punishes their authors as criminals. The English law was very severe in criminal prosecutions for libels. It denied the libeller the privilege of proving his charge to be true, and deemed the offence against the general welfare the same, whether the accusations were well founded or false. In most of the American States this ancient rule has been altered by statute, and in criminal trials for libels, as well as in private suits for libels and slanders, the truth of the charges may be shown as a defence. Some States have gone so far as to protect this right by a constitutional provision. Late statutes in many of the States have greatly changed the law in respect to libels and slanders, particularly by affording greater facilities to the defendant to show that he was not actuated by positive malice in uttering or printing the charges, and thus to free himself altogether from the penalty, or to mitigate its severity; but it is only necessary to advert to these alterations; the general character of the offence remains untouched.

### 2. *The Right of Personal Liberty.*

§ 646. By the English law, as fundamentally established in Magna Charta, the Petition of Right, the *habeas corpus* act, and the Bill of Rights, and by the American law, as based on the Federal and State constitutions, the personal liberty of the individual is guaranteed in the most solemn manner against private force and public aggression.

§ 647. (1). *Nature of Legal Liberty and its Guarantees.* Legal liberty in one sense is the untramelled right of locomotion, and restraint upon it consists in actual, or constructive,

or threatened confinement of the body. In another and additional sense, as protected by our organic law, it includes an immunity from certain acts of government officials or private individuals, which would not amount to confinement, but which would be offensive or oppressive, and the privilege of doing many acts which are not embraced in the simple idea of locomotion. In guarding the general right of the individual to come and go at will, which is, of course, the most comprehensive and important, our own organic law, as well as that of England, prescribes the only manner in which this privilege may be abridged, by forbidding unreasonable seizures and arbitrary arrests, and by establishing forever that due course of law which is to guide the action of the state authorities. These salutary provisions, with the addition of that preserving the right of a person arrested and suspected of crime to be enlarged from confinement on bail, are the same as those protecting human life which have already been quoted. English history clearly demonstrates the proneness of a government, even in a country distinguished above most others for the freedom of its subjects, in times of agitation, to break over the usual slow and orderly proceedings of the law, and, under the plea of necessity, to resort to arbitrary arrests, made upon mere undefined suspicion, and not based upon the commission of any open act of an acknowledged criminal nature, and even to seek for evidence by general searches among the private papers and effects of suspected persons. It was to cut off all pretence for such invasions of private rights and of the municipal law, that the Constitution, after declaring that no person shall be deprived of liberty without due process of law, descends to a specific enumeration of the requisite steps to render an official abridgment of personal liberty by confinement legal. There must be a warrant issued upon the oath of some other person testifying to the criminality of the party to be arrested, charging him with some known offence; the confinement cannot be indefinitely protracted

after the arrest; a trial before a jury, and based upon an indictment of a grand jury, must speedily be held; and in the mean time, in the great majority of cases, the prisoner must be released upon giving a reasonable amount of bail. After the fact of the crime has been established by a conviction, of course, the right of liberty may be forfeited.

§ 648. Under another sense, the right of personal liberty includes that of freedom of speech, and of the press, of peaceably assembling to discuss the measures of Government, or any other topics, of petitioning the Government for a redress of grievances, and an immunity from unreasonable searches of private effects and papers. These privileges are all necessary in a free state, where the people themselves are the ultimate tribunal of appeal on all questions of public policy. There may be occasions when a factious and unpatriotic use of these guaranteed rights will prove embarrassing to the Government, and exasperating to all good citizens, but the evils which would result from any violent and arbitrary repression would far outweigh those which follow from an occasional abuse.

While personal liberty is thus made safe against the unauthorized power of the state, it is also in general protected from any infringement at the hands of private individuals.

§ 649. (2). *Limitations upon the Right of Personal Liberty.* Guarded as is this inestimable right by our law, it is not entirely unrestrained. It is limited by the necessities of the state itself, in preserving society; it must sometimes yield to the superior claims of the aggregate community. These state necessities require that personal liberty should be abridged as a punishment for crime, and with what scrupulous care and deliberation this sovereign power is exercised, we have already seen; they also demand that sometimes witnesses for public prosecutions should be confined until the time of trial, if they are unable to give bail for their appearance; and that the authority of courts should be supported by the imprisonment of persons guilty

of contempt or of refusal to obey judicial orders; and that lunatics should often be subjected to a close surveillance. Freedom of speech and of the press is also restrained within the bounds of a just moderation; when it descends into licentious attacks upon private character, it becomes a crime, and is severely punished. The right of assembling is restricted to peaceable gatherings, and mobs may be put down by the use of extreme violence, even by the aid of the military arm. Exemption from searches is not complete. The due execution of the criminal law requires that premises and even persons should be searched for stolen goods or for the evidence of crime. In short, the Government is not so restricted by these constitutional provisions, that the ordinary measures of police for the protection of society, for the arrest, conviction, and punishment of offenders, and the detection and thwarting of criminal designs, are hindered. Without doubt, it is often hard to reconcile these general constitutional statements of personal rights with many of the common methods of magistrates and officers in enforcing police regulations, but it should be remembered that these safeguards of our fundamental law were not designed as a shield for criminals, but as a protection for society.

§ 650. Other limitations on personal liberty are of a private nature; they are either placed entirely in the hands of private persons, or are set in motion through their immediate agency. The most important exercise of this private power over individual liberty, though exerted through means of the courts, is the arrest and imprisonment which the law allows in certain cases as a method of enforcing payment of personal claims or debts. Imprisonment for debt was once universal in England and in the United States. One reason for its use in the English law as a remedial measure is to be found in the fact that, until a comparatively recent period, the restraints upon the free commerce in lands originally imposed by the feudal system,

and yet preserved, were so great, that it was almost impossible, or at best attended with great difficulty and expense, to collect a demand from one who had only landed possessions, by any proceeding directed against the property itself. As anciently a great part of the wealth consisted in lands, it was natural that a way should be devised of forcing the debtor to do what the creditor could not himself do. This was accomplished by placing before him the alternative of confinement, or converting his property into money to satisfy the claim. Thus arrest and imprisonment for debt had its origin; and beyond all question, in those old times of greater simplicity of manners, before a widely extended commerce and trade had caused the nation's business and enterprise to be built so much upon the fragile foundation of credit, indebtedness was regarded much more as a moral delinquency, as an offence against right, as partaking of the nature of a crime, than at present. But in modern times, when the fortunes of a large part of the community may be swept away by a sudden collapse of public confidence, such strictness is impossible. At all events, it was established by the English law, and thence imported into our own, that in all Common Law actions to recover money or property, the first step might be the arrest and bailing of the defendant, if he was able to give bail, and that the judgment was followed by the taking and imprisonment of the body of the judgment debtor, until the demand thus established by law was paid.

§ 651. This severe coercive measure has been abandoned in the United States in the case of all ordinary debts, but is still generally retained as a help to enforce those peculiar classes of claims which are characterized by an element of quasi-criminality. Therefore, in the pursuit of private remedies for injuries to person, or reputation, or for violence done to property, such as actions for an assault and battery, for seduction, for slander or libel, for trespasses upon or forcible taking or detention of property, and of private remedies

against fraudulent debtors, arrest and imprisonment is still in use as a part of the ordinary judicial proceeding.

§ 652. There are other private limitations upon the unrestricted right of personal liberty, arising from the domestic relations of husband and wife, parent and child, and guardian and ward. Their full consideration would naturally belong to the description of these relations themselves; they are only here briefly alluded to, in order that the subject of personal liberty may be complete.

In general, by the common law, as recognized in England and our own country, the husband has the custody of the person of the wife, and if blameless himself, may use restraint toward her, even to the extent of confining her to his dwelling, when such measures are necessary to prevent her from eloping, or squandering his property, or going into immoral company. The limits of this power are rather undefined, but so much as is stated above, has been clearly settled. The right of the husband to chastise his wife has never been recognized in this country, nor practically in England since very ancient times.

The parent's right to the custody of the infant child, and to inflict chastisement, and to restrain him by confinement, is well established, nor will the law interfere with its exercise, except when the parent's severity is incited by actual positive malice toward his offspring. Akin to the right of parent over child, is that of guardian over ward, and teacher over scholar.

§ 653. (3). *How the Rights of Personal Liberty may be enforced.*—The remedies for any unlawful infringements of these rights are compensatory, and preventive. The compensatory remedies consist in actions for pecuniary damages, brought by the injured party against the person who has actually inflicted the wrong, or who has aided or abetted it. This right of action extends to every case of unlawful interference on the part of a private person, and to many done by a public officer. All detention is technically an

imprisonment, and the law is so jealous of the liberty of the people, that an action for false imprisonment may be maintained, even when the confinement was merely nominal.

§ 654. But the most important remedy for unlawful restraint of liberty and detention of the person, is that which is preventive, which does not delay for the confinement to be terminated, but interferes at once, and delivers the person from custody. This is the writ of *habeas corpus*, a proceeding which is absolutely necessary to give practical effect to the well-defined safeguards of the Constitution.

The writ of *habeas corpus* is a written order issued by a court or judge, directed to the person detaining another, commanding him to produce the body of the person detained, and to certify the day and cause of his arrest and detention, before the court or judge who issued the writ, and to submit to whatever may be determined in the matter. Upon the production of the prisoner, and statement of the cause of his confinement by the person who has him in custody, the court or judge proceeds at once to examine and decide whether that cause be legal or unlawful; if it be legal, the prisoner is either returned to the hands of his keeper, or, in technical language, is remanded, or is admitted to bail; if illegal, he is at once discharged, or set at liberty. The name is derived from the two important and distinguishing words used in the writ, when this and all other judicial proceedings were written in Latin. There were several other writs bearing the same name, used for different purposes, but this one alone is known and spoken of as *the* writ of *habeas corpus*, as its office so completely transcends that of all others.

§ 655. It has been known to the English law for centuries, and was without doubt invented by the judges to enforce the protective clauses of Magna Charta, although some antiquarians suppose that they have detected its existence before that celebrated instrument. It appears at first to have been used solely as a means of relief against private

restraint, but at a very early day was adopted as a remedy against official and governmental invasions of personal liberty. The statute of *habeas corpus*, passed in the reign of Charles II., did not then introduce this most beneficial proceeding; the legislature only made it certain and effectual, by cutting off the power of judges to refuse it to suitors.

§ 656. From England the writ was adopted into our own Federal and State law. What courts and judges shall have power to issue it, and in what cases that power shall be exercised, depends upon the general jurisdiction of these tribunals. If they, like the superior courts of England, have an authority coextensive with the municipal law, to entertain and decide cases of all classes arising under the provisions of that law, their control over this writ is regulated entirely by the general unwritten law, and by such statutes as may have been passed relating to the subject. If, however, they were constituted by statutes, and thence derive all their jurisdiction, their power over the writ extends only so far as the legislature may have entrusted it to them. In other words, one species of tribunals derive their power from a source back of the legislature, and may exercise it in all cases except those in which the legislature has limited or destroyed it. The other species derive their authority from a legislature, and are entirely limited and restrained in their use of it by the statutes which conferred upon them the judicial function. In the first division are embraced the superior courts of the several States, which represent those of England, and administer the law of judicial decision in its widest scope; in the latter class are included all of the Federal courts of the United States, which draw their jurisdiction entirely from the Constitution and from statutes of Congress passed in accordance with the Constitution. The State courts then, being governed by the rules of the common, unwritten law, may and must issue the writ of *habeas corpus* in all cases allowed by that law, except when they have been restrained by State statutes;

while the Federal courts can only resort to it in those instances specially ordered by Congress. The national legislature has conferred on the United States courts the right to issue the writ for the following purposes: to inquire into the cause of "commitment" generally, when the prisoner is in custody by virtue of the authority of the United States, the term commitment meaning a detention by virtue of some legal process or proceeding; also to inquire into the cause of commitment or confinement when the detention is on account of any act done by the prisoner in pursuance of a law of the United States, or of a direction from a judge of a United States court; also to inquire into the cause of the confinement of a subject or citizen of a foreign state, when the detention is on account of an act done under the alleged authority of that foreign state. These are the cases in which the Federal courts may resort to the *habeas corpus*. The first allows its use when the arrest and confinement has been made in pursuance of some assumed legal authority of an officer of the United States, but does not extend to instances where the deprivation of liberty is caused by a mere private individual, or by a State government, law, or officer. The second extends the privilege to persons arrested and detained by a State law, court, or officer, in consequence of some act done by virtue of the authority of the nation itself. This presents then the case of a direct collision between the Federal and State powers. The statute was passed for a particular occasion, to meet the nullifying acts of South Carolina, and to assert the supremacy of the Federal Congress and legislation, by summarily delivering from the hands of the State officers those persons who should be arrested for enforcing the laws of the nation. It has frequently since been used, and especially as a means of rendering the fugitive slave law effective against State laws and courts, who have sometimes attempted to interfere with the duties of the Federal officers by arresting and confining them for alleged breaches of local legislation. The

third grant of authority is more limited in its operation; it was given that the national judiciary might have the entire control of forensic questions affecting our foreign relations. From this review it is evident that the power of the courts of the United States to issue the writ of *habeas corpus* is restrained within narrow bounds.

§ 657. The State courts on the other hand, are in general confined by no such limits. Their jurisdiction extends to confinements and detentions by private persons, and to those caused by State authority of any description; it goes further still, and may inquire into the reason of detention of persons deprived of liberty by Federal judges or executive officers.* In many of the States, and probably in all, the action of their courts is regulated, and in some few particulars limited, by statute, but it would be useless to inquire into these various legislative modifications of the inherent jurisdiction of the courts. It may be assumed, in general, that the courts and judges of the several States are obliged to issue the writ when application is made, unless that application itself shows that the confinement is legal. For instance, if the prisoner, when demanding judicial interposition in his behalf, should show that he had been regularly arrested, tried for a crime by a competent court, condemned, and sentenced to confinement, no court or judge would go through the useless formality of issuing a writ, when the applicant must be immediately remanded. On the other hand, if it should be shown that, although the forms of trial had been observed, the court which condemned the prisoner had no jurisdiction in his case, so that its whole proceedings were void, then the writ would be issued, and the person discharged from custody. In neither case would the judge

* A late decision of the Supreme Court of the United States, however, seems to have denied to the State courts the power to interfere by means of the writ of *habeas corpus*, in any case where a person is held in custody by the Federal or national authority. This power had, previously to this decision, been extensively exercised.

inquire into the actual guilt of the prisoner and the justice of his sentence, for the writ of *habeas corpus* is not intended as a means of reviewing convictions and arrests, so as to discover whether they were based upon a correct understanding of the facts.

§ 658. The following will serve as examples of the use of the writ of *habeas corpus* by the State courts. It is invoked by husbands to obtain possession of their wives detained away against their will; by parents and guardians to aid in recovering custody of their children or wards, who are controlled by persons not possessing the legal right to their custody; by prisoners in confinement by virtue of warrants or other legal process which are void from some inherent defect, praying to be set at liberty; by prisoners in confinement by virtue of warrants or other legal process which are valid, asking to be admitted to bail; by persons arrested by State or national military power, in instances where the martial law has no jurisdiction or application, and the arrest is claimed to be entirely arbitrary and oppressive, and a discharge is demanded; by persons regularly arrested and confined by virtue of some State or Federal law, which is claimed to be absolutely unconstitutional and void. These instances will suffice to show the importance of the writ of *habeas corpus* to a people zealous in preserving their liberties.

§ 659. (4). *Of the Status of Slavery.* The condition of freedom naturally suggests its opposite, that of slavery. In speaking briefly on this subject, I shall not attempt to consider it as a moral, political, or economical question, but simply to state some of the more general legal principles connected with it, and especially to describe some of the causes which led to its disappearance from England.

Whatever may be said of the repugnance of the institution of slavery to the natural law, it has existed very generally among different nations, and was for a long period perhaps universal. It flourished among the Jews, the

Greeks, the Romans, and the German invaders of western Europe. We have seen that the primitive Germanic society was divided into two great classes, the free, and the unfree; and that the lowest grade of the latter were absolute serfs. Notwithstanding its universality, the Roman jurists, after Christianity had shed its benign influence over their jurisprudence, declared it to be contrary to the law of nature, and to exist only by positive enactment. The digest defines it to be "a constitution of the law of nations, by which one is made subject to another contrary to nature." And the better class of writers on public law may be assumed to be unanimous in supporting the principle, that we can only look for the foundation of the relation of master and slave in positive legislation of some description; that it cannot be rested upon any of those great truths of natural law which underlie and support so much of the jurisprudence of different nations.

§ 660. Slavery is a status or condition implying perpetual servitude to the master or owner, upon whom it confers the complete control and dominion over the labor, actions, acquisitions, and person of the slave and his offspring, with the limitation that his life and limbs are protected against the owner's violence, and even this exception to the absolute right has not always existed. Of course, the rights of owners are regulated by the laws of the countries where the institution prevails, and are extended or limited according to considerations of morality or expediency. Thus, at one time, the Roman master had the entire dominion over the lives and limbs of his slaves, with power to inflict punishment of any amount and description; but when the sentiments of equity and charity became more widely disseminated, this extreme rigor was mitigated, and some protection was given to the servile class. In the Southern States of America it is not considered expedient that the slave should be educated, and therefore stringent laws have been passed forbidding them to be taught to read and write, yet

at the same time oral instruction, especially in religion, is permitted and favored.

§ 661. Of Roman slavery I have already spoken. In England the institution existed in ancient times under the form of serfdom, and traces of it can be discovered down to the reign of James I. It is now, and long has been, unknown to the Common Law, which recognizes all persons within its influence as freemen. The condition, rights, and disabilities of the serfs or villains have been sufficiently described in the chapters on the Anglo-Saxon laws, and on the feudal system. They were to all intents slaves, although they were distinguished from the servile classes in Rome and some of the United States by this very important characteristic, that while they possessed hardly a shadow of rights as against their masters, in respect to all other persons they were in the same condition as freemen.

§ 662. The extinction of serfdom in England is not due to any statutes, or to any great and sudden change in the opinions of the governing classes in regard to the morality or expediency of the institution; it was the gradual and progressive work of the courts in developing a simple but most comprehensive legal principle. This principle was that the presumptions should always be in favor of freedom, and not of slavery. By the application of this doctrine in all possible ways, and by a steady leaning of the judges toward liberty, the old institution began to give way, and finally succumbed. Thus, very slight acts or omissions of the master toward his serf, were construed to be manumissions. Among these were the vesting in him the ownership of lands, receiving homage from him, giving him a bond, suffering him to be on a jury, suffering him to join a religious community, bringing ordinary actions against him, joining with him in an action, answering an action brought by him, without setting up the villanage, all of which were taken as admissions of the villain's liberty.

§ 663. But the anxiety of the courts to protect the status

of freedom was most clearly shown in those judicial proceedings directly carried on between the master and his alleged slave.

Of these there were two classes. The one was brought by the serf against his lord to establish his rights and capacity as a freeman; the other was instituted by the lord to establish the villainage. In both, the burden of proof was thrown on the master; even when the slave was the plaintiff, his owner must prove his claim by direct evidence. If, after he had commenced his proceeding, the lord should fail to prosecute it, or, in technical language, should be nonsuited, his claim was defeated, and the villain forever manumitted. On the other hand, if the serf should be nonsuited in any action instituted by himself, he suffered no inconvenience, and was permitted to commence another.

§ 664. In a suit prosecuted by a lord against his villain to enforce his claim over the latter, the fact of the defendant's serfdom could only be shown in two ways, either by his own confessions made openly in a court of record, or by proof that he and his ancestors had been villains for a time beyond the memory of man. The lord must prove the slavery to have been ancient and immemorial, or the defendant must freely and formally acknowledge it. If any ancestor of the villain, near or remote, could be shown to have been actually or constructively free, the master's claim was defeated. To make the judicial pursuit of the right of one man over the person of another more difficult, the courts further provided that the fact of this immemorial condition of slavery in the ancestral stock of the defendant could only be proven by the testimony of other persons of the same blood, who would confess that they were villains, and that their common ancestors had been so time out of mind.

§ 665. In regard to the offspring of slaves, the Roman rule was, *Partus sequitur ventrem*, or the status of the mother determines that of the child. This maxim inevitably acts unfavorably to the slave, for the condition of the mother

can always be ascertained, while that of the father may be in doubt. The English rule was, on the contrary, *Partus sequitur patrem*, or the status of the father determines that of the child. As a corollary to this principle, the children born in wedlock only, of villain parents, were themselves serfs, while all bastards were free; for by applying the presumption in favor of liberty, it was held that, as the father of a bastard was considered *legally* uncertain, he might possibly be a free man, and therefore the child should have the benefit of the doubt. If, therefore, in a suit by a lord against his alleged villain, it should appear that any male ancestor of the latter, however remote, had been a bastard, that fact at once destroyed the owner's claim; for the courts argued, with most strict logic, that if the ancestor was a bastard, he might have had a free father, and therefore was himself free, and the discovery of a free person in the chain of descent, no matter how many generations removed, destroyed the essential element of immemorial slavery in the defendant's family. Any other circumstance which would show that the status had not existed for a time beyond memory was seized upon with equal readiness to work the serf's manumission.

§ 666. These are some of the particulars in which the courts of England at a very early period applied the strong presumptions in favor of liberty, and threw obstacles in the way of a judicial establishment of the condition of serfdom. As an inevitable consequence of the action of the judges, continued through generations, the institution expired, and thus, by the natural development of a single principle, the common law of England was brought into a complete antagonism to any kind of slavery.

§ 667. Slavery, in the United States, is entirely a local institution of those States in which it is established, and rests alone on positive legislation. It is a mistake to suppose, however, as has been sometimes urged, that this positive legislation must be in the form of statutes; for in these States, as well as in all others, and in England, the greater

part of the municipal law has never been enacted into statutes, but is the product of judicial decision. When it is said that slavery depends upon positive legislation, all that is meant is, that it is recognized, provided for, and sustained by the municipal law of a country, and has no force or efficacy or sanction beyond the territorial limits within which that law prevails.

§ 668. The general rules and maxims defining the condition, rights, and disabilities of the servile class in certain of the United States, bear a stronger resemblance to those of the Roman law, than to those of the old English legislation respecting serfdom. Children follow the status of the mother. In all judicial proceedings between a master and an alleged slave, involving the question of the existence of a state of servitude, the presumptions are in favor of slavery, and not freedom. This is shown both by the decisions of courts, and by the provisions of statutes. With such fundamental legal principles to guide their action, the judiciary must contribute to the strength and security of the institution, and not to its gradual overthrow.

### 3. *The Right to acquire and enjoy Private Property.*

§ 669. This natural right is guaranteed in the fullest manner by the Federal and State constitutions to all persons except aliens, or individuals of foreign birth and owing foreign allegiance, who have not the legal capacity for a full enjoyment of property in lands. With this single exception, borrowed from the law of England, every free person has the right to acquire, use, and dispose of all kinds of property in any manner which is not directly injurious to his fellows. The United States Constitution provides that no person shall be deprived of property without due process of law, that private property shall not be taken for public use without compensation, and that taxes shall be apportioned according to the number of inhabitants, and thus guards against any official or private invasions of the rights of ownership.

§ 670. To enforce these general prohibitions, the law affords abundant remedies, both preventive and compensatory. These consist in actions by which a person may either recover his own property which has been unlawfully taken or withheld from him, or compensation for its taking, detention, or injury, from the property of the aggressor, or may, in certain cases, invoke the aid of the courts to ward off a threatened injury. In fact, by far the greater part of the practical rules of our municipal law, and of the actions which occupy the attention of the courts, relate to some infringement upon the right of private property, and to the methods of recovering compensation for the same. The ways in which this right may be invaded are as numerous as the transactions which can arise in the complications of business and of society.

§ 671. Except through the means of a judicial action, no private person may lawfully interfere with the property of another. By such an action regularly instituted and prosecuted through the court, and terminating in a judgment, he may cause the defendant's property to be seized and sold, and the proceeds to be applied in discharge of his own claim; but still all of this proceeding assumes that the person setting in motion this legal machinery is not so much invading the defendant's right of property as maintaining his own; not so much seizing another's possessions as retaking what, from some prior transactions, equitably belonged to himself. If A., for any reason, is indebted to B., and the latter enforces his claim through the help of the courts, he is, in fact, only demanding and obtaining a certain amount of his own property, which had been in possession of A.

§ 672. While private property is thus protected, it is yet subordinated to the public needs, to the demands of the state as they are expressed through the acts of the legislature. This claim of the state over the property of its individual members may be expressed and enforced in two ways, by taxation, and by the right of eminent domain.

Both of these rest upon the same foundation; in both, private property is taken for the public use, and compensation is returned. In the exercise of the right of taxation, the compensation consists of the benefits which accrue to the taxpayers from the very fact of government, the protection to themselves and their property, and all the advantages of a well-regulated society. When the Government resorts to its right of eminent domain, and appropriates the property of a particular individual, it returns to him, as the Constitution requires, special compensation.

§ 673. Taxation, in some form, is necessary in all governments, and the burden of it is distributed among the community or certain classes of it, according to some rule of apportionment. Thus it may be a certain equal amount paid by every individual, or a capitation tax; or a certain percentage paid on the value of property; or a certain fixed sum paid for particular species of property; or for the privilege of carrying on particular kinds of business; or a duty paid for the importation of goods. But whatever method may be resorted to, the authority of the legislature is supreme. They are the only judges of the necessity or amount of a tax, and there is no governmental restraint upon their power to take the entire private property of the community as a tax. Chief Justice Marshall says, in a case decided by the Supreme Court of the United States: "The power of legislation and consequently of taxation operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the Government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power may be

abused, but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." In another case, the same eminent judge remarks: "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the Government may choose to carry it. The only security against the abuse of this power is found in the structure of the Government itself. In imposing a tax, the Government acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their Government a right of taxing themselves and their property; and as the exigencies of the Government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislature, and the influence of the constituents over their representatives, to guard them against its abuse." Not only may the legislature exercise the power of taxation themselves, but they may delegate it to local municipalities, as towns, cities, or villages, for the purpose of local administration. Thus the assessment made by a city common council upon the property holders benefited by the improvement of a street, is as truly an exercise of the general power of taxation, as a statute passed by a legislature, and including the whole state within its scope.

§ 674. The right of eminent domain is that right which the Government possesses to take the private property of an individual, and appropriate it to a public use. It is based upon that supreme authority which the state, the entire body politic, holds over all its members; it flows from the principle that the rights and convenience of an individual must yield to the higher necessities or convenience of the whole. Based upon the same foundation as the power of

taxing, it is used for a different purpose and in a different manner. "Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. Private property, taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the Government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual."

§ 675. The right of eminent domain is sometimes exercised directly by the state as a whole, or by some local organization, as a county, a town, or a city; or it is often delegated by the legislature to associations or corporations of private persons, whose object is to prosecute some work of public improvement. In the former case the state itself, or the county, town, or city, appropriates the property of individuals, generally land, for the purpose of laying out and building such structures as canals and highways, but at the same time makes provision that the value of the property so used shall be ascertained by disinterested persons, and paid to the owner. In the latter case the corporations take and pay for the property, for the purpose of constructing canals, railways, turnpikes, and the like. Practically, then, the right of eminent domain, as restricted by the Constitution, consists in the power which the state has to compel an individual owner to sell his property to the state, or to a corporation authorized by the state, for a price to be fixed by a number of disinterested third persons, whose decision operates as the verdict of a jury.

### 4. *The Right of Religious Belief and Worship.*

§ 676. Although this right is recognized and guaranteed in the fullest manner by the Federal and State Constitutions, yet it is subject to the limitation, that whatever the belief may be, it must not show itself in acts which would be repugnant to the general good morals of the community. Our law would unquestionably allow any person to profess a belief in the Roman mythology, but should some portions of the worship or sacred rites of that mythology be introduced, the votaries would be treated as disturbers of society, and punished accordingly. The theory of our national and State constitutions is, that the state, as an organic body, has nothing whatever to do with religion except to protect the individuals in whatever belief and worship they may adopt; that religion is entirely a matter between each man and his God; that the state, as separated from the individuals who compose it, has no existence except in a figure, and that to predicate religious responsibilities of this abstraction, is an absurdity. Whatever, then, the state does, whatever laws it makes touching religious subjects, are done and made not because the state is responsible, but simply that the people may be secure in the enjoyment of their own religious preferences. Public labor is forbidden by law on Sunday, not because the state, as such, respects the sacredness of that day, or attempts to enforce its observance, but because a large portion of its worthy citizens do regard the day as sacred, and employ it for public and private worship, and have a right to be protected in the quiet use of the time for those purposes. So far as the state is concerned, the laws forbidding public labor on Sunday, stand on exactly the same footing as those forbidding disorderly houses, public intemperance, and all other acts which disturb the peace. The same may be said of laws against profane swearing. This is not the place to inquire into the correctness of our theory of the relations of the state to religion. It is not

adopted by any other Christian government. Indeed, although the people composing our body politic are doubtless as much impressed with Christian ideas as those of any other nation, our governments, both State and national, by ignoring the whole subject, can hardly be called Christian. It is proper however, to remark, that there is a growing opinion among thoughtful men all over the country, that this theory should be abandoned, and that, as a state, we should acknowledge the claims of God upon us, and avow Him to be the supreme ruler of nations in their organic capacity, as well as of the single individuals who make up the nation.

### *Limitations upon the Personal Rights of Life, Liberty, and Property.*

§ 677. The events through which our country is now passing, have drawn public attention forcibly to these fundamental rights, and to the limitations, if any, which can be lawfully placed upon them. When the contest in which we are engaged is ended, and the nation returns to peace, many official acts will be more closely scrutinized; the foundations of executive, legislative, and especially military power, will be restated; whatever unwarrantable assumptions of authority have been made, will be rebuked; whatever legal, though unaccustomed, powers have been evoked, will be admitted, and their use in the sacred cause of the nation's defence will be sustained. It is proper that all educated and thinking persons should understand the general principles upon which the resolution of these momentous questions depends. They form a part, and, it appears now, a most important part, of that constitutional law, with which every good and true citizen should be familiar.

§ 678. I propose then briefly to examine whether there are any limitations upon the general safeguards which the Constitution throws around life, liberty, and property; when and to what extent these limitations apply; and which de-

partment of Government may rightfully exercise the power of calling them into operation. This investigation will embrace the subject of arbitrary arrest and imprisonment of persons; of suspension of the privilege of the writ of *habeas corpus;* of trials for crimes, and in methods, unknown to the ordinary law; and of searches and seizures of property without judicial warrant and the process of courts.

§ 679. As a preliminary to this examination, I will recapitulate the substance of the more important constitutional provisions which are the strong bulwarks of personal rights. These protect the people in their persons and property against unreasonable searches and seizures; forbid warrants to issue except on probable cause supported by oath; declare that no person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, and in the militia when in actual service; that no person shall be deprived of life, liberty, or property without due process of law, which includes all the regular forms of proceeding known to the Common Law; that trials for crime shall be speedy and public, before a jury; that excessive bail shall not be required, nor cruel nor unusual punishments inflicted; and that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

§ 680. These are the most important clauses to which we all appeal as an authoritative statement of our personal rights, and a restriction upon the powers of Government. In determining what scope is given by them for governmental action, we must ascertain their meaning and application, and in doing this there are one or two rules of interpretation which will aid us. One rule is, that these constitutional provisions should be read according to their plain and common meaning, without recourse to any artificial or technical construction, unless certain words or phrases are employed in a

distinct technical sense. Such words and phrases are used; and among them "writ of *habeas corpus*," "warrant," "due process of law," which are strictly legal terms. But when the proper signification is given to these words, the portions of the Constitution in which they occur, as well, in fact, as all other parts, must be construed according to the plain and common import of the language. This is a principle thoroughly settled by judicial decision.

§ 681. When we attempt to discover the application of these several provisions to the departments of Government in defining their respective powers, the analogy of the English constitution cannot be implicitly followed, although it serves to throw much light upon our own. The great principles of freedom and security of life and property, which are embodied in our organic law, were directly borrowed from that of England, from Magna Charta, the Petition of Right, the *habeas corpus* act, and the Bill of Rights. To them we must look for the spirit of these enactments; in English history we discern the struggles in which these rights were nourished and strengthened, until they attained vigor and full development. But the methods in which these principles are practically applied in England and the United States are different. The English Constitution consists of tradition and statutes, and Parliament is supreme over each. Its acts, altering this Constitution, become a part of the Constitution itself. It has power to remodel the judiciary, abolish the national church, repeal the guarantees of the Bill of Rights, of the *habeas corpus* act, or even of Magna Charta. The prerogative of the courts to decide upon the validity of an act of Parliament, and declare it unconstitutional and therefore void, is unknown in England.

§ 682. With us, Congress, the executive, and the judiciary, are coördinate, independent checks upon one another, each possessing defined powers conferred upon it by the organic law which gave them all being. Neither can rightfully assume functions denied to it, nor infringe upon the

established authority and duties of the other. Congress is undoubtedly the most powerful department of the Government, as it is natural and just that the law making branch should be superior to the law executing, or the law interpreting.

§ 683. In construing the Federal Constitution, we cannot, then, transfer all the acts of the English Government to our own, and make them precedents. We do recur to English history to learn the foundation, value, and defences of the invaluable personal rights we are discussing, and to discover the spirit in which they have been fortified and perpetuated, and the occasions on which they have been temporarily suspended; but when we come to determine the manner and means in which they are to be preserved or suspended *by us*, the analogy is not so perfect. The Federal Congress has but a slight resemblance, in the extent of its authority, to Parliament; the Federal judiciary is far more powerful than the superior courts of England. The department of the English Government which has been most feared, with which the contests have been the fiercest, and which is now completely hedged in with restrictions, is the crown. This continued jealousy of the political power of the crown proceeds from the fact that it is a unit, governed by one will and purpose; but principally from the fact that it is hereditary, only answerable to the people in mere theory, and practically only to be reached by the revolutionary measures of deposition or expulsion from the throne. The Federal President is so directly responsible to the people, and holds his office for so short a time, that little danger is really to be apprehended from his unwarrantable assumptions of power.

Having thus stated the constitutional provisions which secure general personal rights, and the light under which they are to be interpreted, I will proceed to examine their meaning and effect.

§ 684. I. What is the effect of these guarantees contained in the organic law?

It is necessary to fully comprehend the far-reaching influence of these fundamental statements of personal rights, to apprehend their full meaning and consequence, before we can ascertain when and by what means they may be temporarily displaced. A full appreciation of their vital force can only be attained by a careful analysis of English constitutional history, and a comparison with the annals of other European countries in which the principles of liberty have been overcome in the struggle with prerogative. I can only, however, give mere dry conclusions, without attempting to illustrate by historical precedents. And,

§ 685. 1. These constitutional guarantees are binding with equal force upon the legislature, upon the executive, and upon the judiciary. The will of the people has spoken through their organic law, and the government which they have created, and even themselves, who called that government into being, must alike bow to the authority of these declarations of right. Furthermore, as the clauses in question are mandatory and peremptory in their nature, and directed at once to each branch of the Government, they require no statute of Congress, decision of judge, or act of President, to execute them, and give them binding efficacy. They execute themselves without the aid of an inferior law. Any proceeding of the Government in derogation of their command would be void, any proceeding declaratory, would be useless. This proposition is evident in reference to those provisions contained in the amendments to the Constitution.

§ 686. The clause relating to the writ of *habeas corpus* is *practically* permissive to some one department of the Government or other. Even if it does not directly, or by necessary implication from the very language used, *confer* the power to suspend the privilege of the writ of *habeas corpus* during the times of invasion or rebellion, it *assumes that power to exist* in the Government, *with such strength and cogency of inference, that courts, legislature, and executive, must also assume it to exist.* The necessary scope and

meaning of the clause, therefore, is either directly to create the power, or to peremptorily recognize it as created by some other portion of the Constitution; and these two constructions practically amount to the same thing, for from either, the authority residing in some department to suspend the privilege of the writ, flows as an inevitable consequence.

§ 687. 2. Assuming that the power granted by the Constitution to suspend the privilege of the writ of *habeas corpus* in certain specified cases, has been rightfully exercised, we are to inquire what is the result of such act of suspension upon the powers and functions of the Government and the rights of the people of the United States? We have seen that certain clauses of the organic law are peremptory upon our rulers, and that the writ of *habeas corpus* may be made inoperative under certain conditions; does this permitted act of the Government, through some one of its departments, confer any authority to destroy the negative efficacy of these other clauses, any ability to escape from their restrictive energy?

§ 688. (1). What does suspending the privilege of the writ of *habeas corpus* mean? Some distinction has been drawn by late writers, between the words "suspending the privilege of the writ," and suspending the writ itself. The effect of the first would be to allow the writ to be issued by a judge when demanded, but to destroy its efficacy by legalizing a disobedience of its commands; the other would imply an injunction upon the judiciary not to issue the writ when demanded. It is admitted that such a power as this latter could only be exerted by a legislature which clothed the judges with authority to use these writs as a part of their judicial procedure, while it has been claimed that the exercise of the former species of restraint is merely executive, and does not need the sanction of the legislative consent. It may be doubted, however, whether the Constitution is to be construed with any such refined distinctions, which make grants of enormous power to depend upon the employment

of a single word in a sentence. The plain meaning of the clause is, that the right given to a prisoner by statute or by the Common Law, to have his case summarily examined by means of the writ of *habeas corpus*, and himself tried, bailed, or discharged, as the circumstances require, may be taken away for a season, during the existence of an invasion or rebellion. This is the evident import of the clause, whether the suspension is the effect of an act of Congress giving power to the President or other officials, or whether the Constitution grants this power directly to the executive as a part of his *civil* functions.

§ 689. (2). But suspending the writ of *habeas corpus*, or the privilege of the writ, and the right to the speedy inquiry into the cause of imprisonment which it implies, leaves all the other constitutional guarantees of life, liberty, and property intact; they remain in as full force and efficacy, as though the writ of *habeas corpus* were left in active operation. The absence of the writ of *habeas corpus*, or the destruction of its utility as a remedial measure, does not confer power on the executive or his subordinates to arrest or imprison in any other way, or for any other cause, than that laid down in the Constitution; nor on Congress, to pass laws providing for such arrests or other invasions of private rights, or freeing the executive officers from the penalties of any illegal acts which they may have committed; nor on the judiciary, to arrest, try, or condemn, in any other manner than that established as the "due course of law." These several personal rights of life, liberty, and property do not flow as consequences from the existence of the writ of *habeas corpus*—they are something above and beyond that. On the contrary, the writ of *habeas corpus* is the result of the anterior existence and enjoyment of the right of freedom, invented by the judges to sustain and enforce that inestimable privilege. In the English and our several State courts, the claim which an imprisoned person has to the assistance of this writ, flows primarily from the

Common Law; in the Federal courts it proceeds entirely from statutes of Congress. These other more general and comprehensive rights are based upon something superior in authority to the Common Law or statutes, the supreme organic law of the nation. Much of the doubt and confusion in regard to this subject result from the palpably false assumption, that suspending the privilege of the writ of *habeas corpus* carries with it for the time the suspension of other constitutional guarantees, and enables the President, or legislature, or judiciary, to make arrests, hold in confinement, try, and condemn, in some other way than that provided for in the constitutional Bill of Rights.

§ 690. (3). The writ of *habeas corpus* is only a *remedy* by which a person can be summarily delivered from unlawful imprisonment; a means of sustaining and enforcing the exalted right of personal liberty. It is only one of several remedies, the others distinct from it, but all founded upon the illegality of certain species of arrest and confinement. Now, it is well settled by numerous decisions, and has become a part of our constitutional law, as well of the nation as of the several States, that, while the legislature may alter remedies, or, in other words, the judicial means of enforcing rights, they cannot take away or destroy causes of action, or, in other words, the rights themselves which may be judicially established; nor can they destroy *all* remedies, for this would be in effect destroying a cause of action. The Constitution gives to some department (for the purposes of our present inquiry it matters not which), the power in certain cases to make this single remedy of the writ of *habeas corpus* inoperative, but no power to take away the others; for this would be indirectly destroying the personal rights secured by the Constitution, and what the Government is forbidden to do directly it cannot do by an evasion. These other remedies are compensatory, and consist in actions for damages against the officials who have infringed upon personal rights by illegal arrests or seizures. In this respect

the executive, the legislature, and the judiciary are placed by the Constitution in the same condition. While the privilege of the writ of *habeas corpus* may be suspended by Congress or President, I do not now assume which, Congress *can in no case* deprive an injured person of the right of pursuing the other remedies and enforcing his just claims, by indemnifying or protecting the President or other ministerial officers from the consequences of acts wrongful in themselves. Here the analogy between our own Constitution and that of England cannot be trusted; for Parliament, because it has supreme control over the whole subject, and the power to unmake what it has once created, to alter the whole course of the law, and to take away rights or bestow them, may, by subsequent statutes, save harmless the ministerial officers of the crown from the effects of their unwarranted measures, and legalize acts which, at the time of their commission, were flagrantly in violation of law. These enabling statutes of Parliament have been quite frequent in times of excitement and sedition.

§ 691. (4). A suspension of the writ of *habeas corpus*, therefore, simply deprives the person imprisoned of one species of remedy, although a most important one; it does not, by any inherent quality of transmutation, legalize the confinement; the character of that deprivation of liberty, whether lawful or illegal, must depend upon other circumstances; nor does it for the time deprive the prisoner of other remedies secured him by law; much less does it confer any *active* power upon either department of the Government, but only gives, for the time being, the *passive power* of *resistance* to the claims of the prisoner for summary relief, presented and attempted to be enforced through certain machinery of the courts.

§ 692. 3. The result of this investigation is, that the Constitution, while it grants to the executive or to the legislature, authority to suspend the privilege of the writ of *habeas corpus*, does not confer on either of these coördinate depart-

ments of the Government the *civil* power to destroy, or even weaken for a time, the strong bulwarks which have been thrown up around the most cherished personal rights of the people; that the conserving element of our organic law is so controlling, its principles so sharply defined and precisely stated, that there is no *civil* authority residing in the Government to evade them; that while the Government reposes upon its *civil* functions, all arrests, imprisonments, trials, condemnations, all seizures, all deprivations of life, liberty, and property, must be made according to the "due process of law" described by the Constitution, and known in England since the epoch of Magna Charta, when it was expressed by the term the "law of the land."

It seems to me that these conclusions are irresistible, and that we must look further into the organic law for the source of the governmental power to evade these constitutional restrictions protective of personal rights, to make arrests and seizures, and hold trials and inflict punishments at times, for causes, and in a manner, forbidden by the Bill of Rights.

§ 693. II. Does such a power exist? My answer and proposition is, that it does, and may be rightfully exercised under certain conditions, and these conditions are satisfied when an invasion or rebellion is in progress, or, in other words, when a war is actually raging within the territory of the country itself.

§ 694. 1. Whatever authority the Government may at any time rightfully possess, whatever power it may lawfully assume either in peace or in war, either in the ordinary course of administration or in the exceptional circumstances of rebellion and foreign or domestic hostilities, whatever means it may employ to preserve its own existence or that of the nation as a distinct organization, must be drawn directly or by necessary implication from the Constitution, which gives the Government being, and in which the nation is organically embodied. It is in vain to look beyond this

fundamental law for something superior to it. We cannot, in search of a practical basis on which to rest any assumption of authority, raise the nation itself above the organic law. The notion that we may resort to the instinct of self-preservation, or to the plea of necessity, for the source of power to do acts unwarranted by the Constitution, is in the highest degree pernicious, leading to anarchy, and therefore to tyranny. We must stand by the charter which we have adopted for ourselves, or else we become disintegrated, and our national existence destroyed; we would remain the some collection of individuals, residing on the same soil, but our distinctive character as a body politic, that which makes us the United States of America, would be gone. We, as individuals, might again organize and form a government, but it would be a new one, cut off from the old nationality by an impassable line. But we are not left without authority for the Government to exert its conserving force, even in derogation of the individual rights guaranteed by the Constitution.

§ 695. 2. The Constitution, by providing that Congress may declare war, raise armies and navies, and make rules for their government, and that the President shall be commander-in-chief of the forces, recognizes the possible existence of war, and with it all those inevitable consequences and necessary adjuncts which are universally admitted as accompanying and belonging to war. Peace is the normal condition of this as well as of every other country; and the Constitution, in all its provisions, was more particularly framed for the administration of public affairs and the regulation of society in that condition, but yet it did not contemplate that a state of war was to be a state of peace. The framers knew that the progress of hostilities brings with it, amid other evils, a revolution in social order; that, for the time, all other interests are secondary to the absorbing purpose of repelling force with force; that the whole energies of the Government and of the citizens must be directed

toward the one object of success in arms; that the usual avocations, customs, modes of thought and of administration, must be temporarily superseded by the more peremptory methods of military discipline and movements. But while they recognized all these facts, they did not attempt to descend to particulars in enumerating the incidents of war, and the rights and powers which accompany it, because they knew that nothing can be more variable than the condition of hostilities. But when the Constitution says that war may be declared, it means that all its numerous train of necessary evils must be brought with it. When it says that the President is commander-in-chief, it means that, as such commander, he is clothed with all those belligerent powers which war demands for its successful prosecution. It did not attempt to abridge these powers, nor even to define and limit them, and thus hamper the Government, but, recognizing the fact that war must often override the due course of civil law, and that generals and armies must often do things contrary to the well-ordered condition of peace, it left the whole subject where it has been placed by all writers on public law, and by the practice of civilized nations; it conceded that the rights of life, liberty, and property, as they are hedged about by certain careful provisions of the Constitution adapted to the common course of events, must at times yield to the imperious necessities of a state of hostilities. *Inter arma silent leges.*

§ 696. 3. One of these necessary adjuncts and inevitable consequences, which at times follow a state of hostilities, is the existence of martial law; and this law, which is implicitly contained in the Constitution, gives full power to the Government to suspend the privilege of the writ of *habeas corpus*, to make arrests and seizures of persons and property, to hold trials, and to inflict punishments, for other causes, at other times, and in another manner, than those prescribed by the general Bill of Rights.

§ 697. (1). A full understanding of the meaning of the

term martial law, is a prerequisite to the determination of the question whether it can exist in this country as a concomitant of war. There is much uncertainty and error on this subject even in works of high repute. "Military law" and "martial law" are entirely distinct. The former is the code of regulations for the government of troops alone, either in peace or war; it is really a part of the civil law, applicable only to a certain class of citizens, those engaged in military pursuits; it is as susceptible of being reduced to well-defined rules and methods as any branch of the statute or common law of the country. The Constitution of the United States requires that it shall be enacted by Congress, in the same manner and with the same force and effect as any other legislation. It is contained in that code called the "articles of war." This military law is not the source of the extraordinary power in question.

§ 698. Martial law is different, and is not from its very nature so easy to define. The most complete and accurate definition which I have met is contained in the "North American Review" for October, 1861, in an article attributed to one of the distinguished professors at the Harvard law school, which I quote and adopt. "Martial law is that military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations in carrying on the war, and which extinguishes and suspends civil rights, and the remedies founded upon them, for the time being, so far as it may appear to be necessary in order to the full accomplishment of the purposes of the war; the party who exercises it being liable for any abuse of the authority thus conferred. It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military rule and military action." It applies as well to civil-

ians as to persons in the army, and although very general in its scope, is not entirely arbitrary and capricious. It cannot be denied that some writers who have declaimed against the martial law, have given other definitions of it, and painted it in far blacker colors than the above. Thus Mr. Justice Woodbury, in a dissenting opinion in a case to be referred to soon, speaks of it in this manner: "By it every citizen, instead of reposing under known and fixed laws as to his liberty, property, and life, exists with a rope around his neck, subject to be hung up by a military despot at the next lamp post, under the sentence of some drumhead court martial." But such language is a mere appeal to prejudice, and is not warranted by any reason or authority. It is similar in spirit to that once used by the English Common Law judges in reference to Equity, when this was described as being measured by the length of the chancellor's foot.

§ 699. Such a martial law as that above defined, has been declared by a solemn judgment of the Supreme Court of the United States to be a necessary and lawful consequence of a state of actual hostilities in this country, and to be a protection to the officers executing it, from the penalties of their acts which were unwarranted by all merely civil rules and guarantees of personal rights. The case was that of Luther vs. Borden (7 How. R. 1), which arose out of the rebellion in Rhode Island commonly called Dorr's rebellion. The contest between the regular government and the revolutionary one headed by Dorr reached a point where active military operations took place, though no battles were fought or lives lost. The legislature proclaimed martial law throughout the whole State The defendant, an officer of the State militia, while endeavoring to arrest the plaintiff, broke into and searched his house with a party of soldiers. The action was brought to recover damages for this trespass. The defendant relied upon the fact that his Government was legitimate, and that he acted under the martial law, and was therefore protected. It appeared in evidence,

or, rather, the fact was offered to be proven by the plaintiff, that he was not then connected with the insurgent forces, and that there were no such forces within several miles of his house. The case was most elaborately argued by distinguished counsel. It was claimed on behalf of the plaintiff, that the insurgent Government was legitimate, but, if not, that the defendant was not protected by the martial law, which was an usurpation of authority unknown to our institutions. Both of these points were necessarily contained in the case, for even if the old government was still supreme, unless the martial law was lawful, the act of the defendant would have been a gross violation of the plaintiff's rights. The Supreme Court of the United States decided that the action could not be maintained; that, as the Federal administration had recognized the old government of Rhode Island as the true one, the courts must also treat it as such, and that the existence of martial law was a full protection to the defendant. Chief Justice Taney, in delivering the judgment of the court, after asserting that the State might put down the opposition by armed force, proceeds: "And if the Government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force, and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing that he might be there concealed. Without the power to do this, martial law and the military array of the Government would be a mere parade, and rather encourage attack than repel it. No more

force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of oppression, or any injury is wilfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable." This decision should be read in connection with the dissenting opinion of Judge Woodbury, for often the full force and scope of the judgment of a court is best ascertained by reference to the views of those judges who differ from the majority. In his opinion, Judge Woodbury distinctly admits the effects of the martial law to be subversive of the common course of the civil law and of personal rights, and therefore argues that it is opposed to our institutions, and cannot exist here. The case, however, clearly establishes the proposition that martial law, in this country as well as in others, is a lawful and necessary adjunct of a state of active hostilities, and is therefore impliedly contained in the war-making grants of the Constitution. I have dwelt somewhat at large on this case, because it is of binding authority, emanating from that high tribunal whose special function it is to deal with constitutional questions, and therefore overrules and nullifies the two or three contrary decisions of State courts which deny the existence of martial law.

§ 700. (2.) The effects of martial law are powerful and far reaching. Taking the place of the usual methods of civil govermnent, it suspends for a while personal rights, so as to permit and require arrests and detentions, searches and seizures, trials and punishments, of a kind far different from those employed in the ordinary course of justice. This is, in fact, the very gist of the martial law. It may also necessarily include in its operation the suspension of the writ of *habeas corpus*, and of all other judicial remedies, by the very force of its own existence. Indeed, the superiority, for a time, of this military rule over the civil tribunals, is entirely incompatible with any interference from the latter by means of this writ of *habeas corpus*. Martial law could not

exist, if the courts had still the power to review every act of a military officer, and inquire into every arrest and confinement. It therefore, for the time when, and at the place where it is in operation, displaces those clauses of the Constitution which guarantee the personal rights of life, liberty, and property. Yet it is not entirely arbitrary; nor is it the mere unrestrained, irresponsible will of a military commander acting without rule or reason. It is not the mere instrument of tyranny, but is intended to be the means of protection and safety to the state, because, from its speedy, energetic, peremptory methods, it is more suited to the exigencies of the times than the more dilatory and restrained procedure of peace. Declamatory writers often speak of it as though it were equally lawful by the martial law to arest and punish the innocent and the guilty, to wreak personal vengeance, and to maintain public order by the strong hand. The case cited above shows, however, that it is placed within proper limits, and that, when a military commander transgresses these, he is answerable as though he were acting without any pretence of authority. "Founded upon the necessities of war, and limited by those necessities, its existence does not necessarily suspend all civil proceedings. Contracts may still be made and be valid, as long as they do not interfere with or affect military operations. A mere trespass by A on the lands of B, unconnected with any military service, is none the less a trespass, and does not require a military trial or condemnation. The courts are not necessarily closed, for all actions relating merely to the private affairs of individuals may still be entertained, without detriment to the public service; but it closes the consideration there of any action, suit, or proceeding in which the civil process would impair the efficiency of the military force."

§ 701. (3.) Powerful as are these effects, they are not in derogation of the Constitution, for that would make them illegal, and the very gist of the martial law is that it legal-

izes these acts of military officers, so that they cannot afterward be punished for them, or pursued in damages. The right to suspend the operation of these constitutional guarantees, and among them the privilege of the writ of *habeas corpus*, is contained in the Constitution as an incident of the state of war. This power does not then depend for its efficacy upon the clause directly relating to the *habeas corpus*, which simply restricts a suspension of the privilege of the writ to times of invasion or rebellion.

The Constitution, therefore, although it denies any civil power to the Government to interfere with the safeguards of personal rights, admits a belligerent power residing in some person or department, insomuch as it admits war, and with it the occasional existence of martial law.

As the power then exists, I inquire,

§ 702. III. When may the power exist, or, in other words, when may the martial law be resorted to within the bounds of the United States?

This point has now been definitely settled by judicial decision, and it is clear that the military rule and authority can supersede the civil functions of magistrates only when a war is actually raging within our national limits. This can only happen during an invasion or rebellion, the very times to which the suspension of the privilege of the writ of *habeas corpus* is confined by the Constitution. In foreign wars, when troops are collected at home and sent abroad for active service, there would be no occasion for martial law and its incidents within any portion of the United States; although in the countries which our armies should occupy, it would naturally and perhaps necessarily be put in operation by our commanders. Thus, during the invasion of Mexico, many of the acts of generals, in organizing temporary governments and preserving order, must be referred entirely to the prevalence and authority of martial law.

§ 703. IV. By whom can the power be exercised, that is, by which department of the Government can the martial

law, with its necessary incidents, be put into operation? My answer and proposition is, by the President alone as commander-in-chief of the army and navy, directly, or through his subordinate officers.

§ 704. 1. Wherever else this authority may be lodged, it plainly does not belong to the judiciary. Their functions are clearly defined; their jurisdiction is known and settled; they have nothing to do with war; in fact, the great effect of martial law is to disturb them for a while in the discharge of their duties.

§ 705. 2. Nor does it belong to the National Legislature. To make this clear, we must look somewhat carefully to the delegated powers of Congress. These are entirely legislative, and all directly legislative functions are centred in this body. It cannot interpret laws, or apply them to particular individuals, for that duty belongs to the courts; nor execute and enforce them, for that belongs to the President; but it may make and repeal them, so far, and so far only, as it is authorized by the Constitution. If setting the martial law in motion is made a legislative act by the Constitution, then it belongs to Congress to inaugurate it. It is certainly beyond the power of Congress or any other legislature to enact the several rules and regulations of which the martial law is composed, for this military rule and authority is not susceptible of being reduced to fixed and precise statements; the moment this was done, it would no longer be martial law, but would become a part of the ordinary civil law of the nation.

§ 706. The powers of Congress in regard to war are great in themselves, but they are few. This body alone may declare war; make rules concerning captures; raise and support armies and navies; make rules for the government of land and naval forces, as well in peace as war; provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; and perhaps suspend the writ of *habeas corpus* in certain cases. Their authority is then fundamental, and all warlike func-

tions of the executive are predicated upon its having been exerted. The President can do nothing in relation to a war, to an army or navy, until Congress has spoken. They have complete control of the purse, and alone can commence a war. They alone can organize the regular or volunteer land and naval forces, either for hostilities at home or abroad, and they alone can provide for calling out the militia for home service. To them belongs the raising and appropriation of money for the pay of the army, for the purchase of supplies and armaments, for the construction of fortifications. They may prescribe the rules and regulations for the internal government of the army and navy, and for the disposition of captures. But they cannot directly put an end to a war, for that belongs to the treaty-making power; they can only indirectly interfere and compel a stoppage of hostilities by withholding supplies. After setting a war in motion they have no direct control of it, and no control whatever, except as they may grant or refuse that material aid of men, money, and arms, which is necessary for its accomplishment, and thus force the executive to their wishes. This great constitutional power of Congress over the purse in war is one of the cherished principles borrowed by us from England, which was battled for there in long and bloody contests, and which is the effective check in the hands of the nation upon the centralized power of the Crown. This is the extent of the legislative powers conferred by our Constitution, and with the exceptions of inaugurating a state of hostilities, and disposing of captures, and perhaps suspending the writ of *habeas corpus*, their functions in time of war and in time of peace are exactly the same. War brings no material addition to the authority which they enjoy in seasons of quiet and order.

§ 707. On this subject there has been and is much misconception, even among those who are considered as statesmen, certainly among many public writers and members of the Federal Legislature itself. Much has been said even on

the floor of either House, of the belligerent powers of Congress to pass various statutes, and committees "on the conduct of the war" have been active in their self-imposed duties. Two statutes or classes of statutes alone can rightfully be enacted by Congress in war, which are beyond their jurisdiction in peace; the one, perhaps, to suspend the writ of *habeas corpus;* the other, certainly, to make dispositions of captures. All other powers belong to and are constantly exercised in the ordinary routine of legislative duties. Committees "on the conduct of the war" may be useful in collecting materials for future histories, but, as legislative agents, they are merely voluntary, and cannot carry their interference farther than a recommendation.

§ 708. 3. The power in question belongs to the President of the United States, as commander-in-chief. When a war has been declared by Congress, and an army and navy raised, the President, as commander-in-chief, has entire control of military operations, untrammelled by any other department. By designating him to this high station, the Constitution has clothed him with great and undivided powers. If the legislature can interfere and dictate to him a line of military action, or order and compel any military measure, *they*, and not he, would be commander-in-*chief*. But it was to escape the certain disastrous result of such a disposition of power, that the command was intrusted to a single head; for better one poor general even, than many good ones. As the chief magistrate, then, derives his authority from the Constitution alone, and as that authority is sufficient, any attempt on the part of the legislature to add to it would be at once useless and nugatory. He, and not Congress, has exclusive right to order what marches, sieges, battles, blockades, campaigns, shall be made. Any attempt of Congress to interfere with the management of the army and the course of hostilities, would be a direct infringement of the rights of the commander-in-chief, and an unconstitutional assumption of power. They can do little in war which they cannot do

in peace. The President alone receives an increase of power from a state of war. Then his peculiar functions as commander-in-chief are called into active play, and are commensurate with the necessities of the hostilities. It should be remembered that the President of the United States bears a double official character. By the one, he is the civil head of the nation, charged with the duty of executing the laws at all times, and in this capacity his powers are ever the same in peace and in war. By the other, he is the supreme head of the military forces, and charged with the duty of directing these forces as occasion may require. In peace, this duty is simple, and is confined on land to the garrisoning of forts, and the stationing of troops on the frontiers; at sea, to the ordering of ships and squadrons to cruise in different parts of the world. But in war, these somewhat contracted duties at once increase to enormous proportions, and the safety of the whole country may depend upon the energy, firmness, and ability of one man.

§ 709. It is easy to declaim against the policy of intrusting so much power to a single official, and to predict ruin to the state from its unscrupulous use, but the Constitution has so ordered, and there is no escape from it. And the universal experience of nations testifies that this arrangement is not only the best, but that it is necessary. The evils to be apprehended from the grant of supreme military authority to one person, are slight when compared with the disasters certain to result from the sharing it among several, and particularly from its commitment to a large deliberative assembly. But there is really no danger, for the English and American Constitutions both furnish to the people a perfect check against the ambition, the rashness, or the weakness of the executive. Their representatives in Parliament or Congress can curb or give the rein to the Crown or to the President at pleasure, for they control the sinews of war; not a cent can be expended, not a soldier enlisted, without their approval. They may grant or withhold, and

king and president are at their mercy. It is thus that our organic law, borrowed in idea and principle from the English, has contrived these well-poised balances, so that the various departments shall work harmoniously, and neither can rush on unimpeded by the other.

§ 710. Now the establishment of martial law in any place or district is not a legislative act, any more than the march of an army, the siege of a fortress, or the blockade of a coast. It is as direct and necessary a consequence of military movements, as the occupation of private grounds for a march, a bivouac, or a battle. The absurdity of Congress assuming by statute to clothe the President and his subordinate officers with authority to move their troops over the fields and farms of the citizens on their marches and in making dispositions for battle, and to take possession of private houses for the wounded, would be patent; but the absurdity is equally great of supposing that Congress can authorize any other purely warlike measure in the progress of active hostilities. As the commander-in-chief has entire and supreme control over military operations, and as the martial law is only an incident of these operations, to be called into effect according to the exigencies of the contest, not as a permanent thing, nor universal, nor necessarily confined to one locality, but temporary and varying, it is an irresistible conclusion that the power to invoke the aid of this law resides alone with him, and does not belong to Congress. A statute of theirs that the martial law should exist in such a city or district, would be as nugatory as a legislative order that such a fortress should be besieged, or march made, or battle fought. Congress alone provides the means to carry on war; the commander-in-chief alone determines how to use them, and one method of using them is to resort to the martial law.

§ 711. V. What is the extent of this power in the President; or, in other words, where, in what places, within what limits, may he put the martial law into operation, and

thus temporarily set aside the ordinary guarantees of the Constitution?

A solemn judgment of the Supreme Court in *Ex parte Milligan*, 4 Wallace's R. 2, 127, a case growing out of the civil war, has settled this question, and has denied the lawfulness of martial law within the United States, except in districts actually occupied by the opposing forces, which are the very theatre of hostilities, and in which the civil courts are, for the time being, completely displaced. "It follows from what has been said on this subject, that there are occasions when martial rule can properly be applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction."

§ 712. These sweeping conclusions of the Supreme Court seem to be open to some criticism. The opinion quoted seems to have confounded martial law with military government, and to have overlooked the fact that martial law is not in any true sense a judicial proceeding, nor a means of executing the civil laws, but is a mode of waging war. The court is clearly correct in holding that neither the President nor Congress can proclaim martial law, and make it general in districts where the courts are open and unobstructed. But the President, as Commander

in Chief, wages war; the sole object of his hostile endeavors is success. In some of his operations he is certainly untrammeled by the Bill of Rights. In an internal war of rebellion the enemies are citizens and traitors, and thus guilty of civil offenses; but he may kill or capture them, or seize and destroy their property, and thus break up their armed opposition. The possibility of civil war therefore demands at least *one* implied exception to the general clauses of the first eight amendments. May it not admit of others? One other is universally conceded. A citizen civilian, in no way connected with the hostile array as a belligerent, who should act as a spy upon the military movements, operations, and preparations, may be seized, tried, and punished by military agents. The explanation of this case is simple and plain. A spy interferes *directly* with the process of waging war; he perils the success of extensive campaigns; he renders the final result of the struggle doubtful; he is in fact acting as an enemy, may be treated as an enemy, and as an enemy forfeits all civil protection, even though his offense might also be considered as treason.

§ 713. This illustration may, perhaps, serve to indicate the occasions upon which alone the President may resort to martial law, and the limits upon its exercise by him. Whenever a civilian citizen or alien is engaged in practices which *directly* interfere with waging war, which directly affect military movements and operations, and thus directly tend to hinder or destroy their successful result, and when, therefore these practices are something more than mere seditious or traitorous designs or attempts against the existing civil government, the President as Commander in Chief may treat this person as an enemy, and cause him to be arrested, tried, and punished in a military manner, although the civil courts are open, and although his offense

may be sedition or treason, or perhaps may not be recognized as a crime by the civil code. The criterion thus suggested confines the operation of martial law within the very narrowest limits. The military jurisdiction allowed by the Supreme Court is more extensive, but is in fact the "military government" by which subjugated districts must for a while be controlled, until the civil rule is re-established.

§ 714. If these views are correct, it follows that the legality of every military arrest, trial, and punishment must be determined upon its own circumstances, and not according to any general and inflexible rules. In fact, these proceedings would be placed upon exactly the same footing as those other apparent breaches of the Bill of Rights which consist in destroying the private property of civilians, or appropriating it to public use, when military exigencies demand such measures.

§ 715. It should be borne in mind, and I repeat the proposition, that the martial law is not an irresponsible, arbitrary rule and authority, lodged in the commander-in-chief, or in his subordinates; that it gives no power to arrest, try, and punish without cause, or in an oppressive manner, but that the officers who exercise and enforce it are amenable to the civil courts for its abuse. Thus, while the martial law is recognized by the Constitution as a peculiar portion of our most general municipal law, it is still in a measure kept in subjection to those ordinary tribunals which are constituted as the administrators of justice, and the conservators of peace.

§ 716. From the foregoing discussion I think the following conclusions may be drawn: That no civil power resides in any department of the Government to interfere with the fundamental, personal rights of life, liberty, and property, guaranteed by the Constitution; That a warlike power is given by the Constitution to the President temporarily to disregard these rights by means of the martial law; That

under the sanction of this species of law, the President and his subordinate military officers may, within reasonable limits, suspend the privilege of the writ of *habeas corpus*, cause arrests to be made, trials and condemnations to be had, and punishments to be inflicted, in methods unknown to the civil procedure, but are responsible for an abuse of the power; And that the martial law, as a necessary adjunct of military movements, may be enforced in time of invasion or rebellion, wherever the influence and effect of these movements directly extends.

## II.

### OF CITIZENS OF THE UNITED STATES, OR OF A PARTICULAR STATE, AND OF THEIR PECULIAR RIGHTS AS SUCH.

§ 717. The rights described in the preceding subdivision belong to all free persons within the United States, whether permanent residents, or temporary sojourners. The number of individuals embraced in the present class is more limited, and they possess, in addition to the general rights already noticed, certain other privileges which appertain to them as citizens of the nation, or of the various States of which the nation is composed. These immunities may be summed up in the fact of political protection, as distinguished from the simple personal protection which is the result of the more general rights of life, liberty, property, and religion.

§ 718. Every nation possesses the power of determining who shall be its citizens. By the common law of England, which is in force in this country, and which may be assumed as also the law of all the European states, persons within the jurisdiction of the government, or limits of the territory, are either natives, or aliens. Natives are those born within the national jurisdiction; aliens are born without that jurisdiction. The exception to this almost universal rule, are the foreign-born children of ambassadors, who are assumed to carry with them the jurisdiction of the nation which they represent.

§ 719. As a general principle of the English and American law, all native-born, free persons, of whatever age, sex, and parentage, are citizens. The United States Constitution and Government may limit, and have limited, this doctrine, and established exceptions to it. One exception certainly includes the Indians scattered through the country, who, although born on the soil and protected by the laws, occupy an anomalous position, being neither citizens, nor entirely foreigners, but more resembling the condition of foreign nations within our limits; foreign to the extent that treaties are made with them by the General Government, and yet domestic subjects, to the extent that they permanently reside within the limits of a State, own landed and other property, and are protected by the laws, and owe to them obedience.

§ 720. The Supreme Court of the United States, in the case of Dred Scott, decided that free negroes, although born within the jurisdiction, are not citizens of the United States. The extent to which this decision went was simply this, that a free negro cannot as a citizen bring a suit in the Federal courts. Since that case, however, the executive department of the General Government has formally declared that it recognizes the citizenship of this class of persons, so far as to allow them the privileges which that department is bound to maintain, such as granting to them passports, protecting them when abroad, and permitting them to avail themselves of the provisions of the navigation laws, which prescribe that the owners and masters of certain vessels trading in the ports of the United States, shall be citizens. There is at present then a conflict between the action of the judiciary and that of the executive.

§ 721. Under the Constitution, the Federal Congress has the power to declare what persons, in addition to those native born, shall be admitted to the rights of citizenship. This power has been exercised in providing that the foreign born children of citizen parents, shall themselves possess

this status. In addition to this limited extension of the right to persons of foreign birth, it has always been the policy of our Government, National and State, to open wide the door to aliens who may wish to avail themselves of the privileges of citizenship. This has been done by the naturalization laws, which prescribe the method by which a foreigner, being a free white person, removing his permanent residence to this country, may throw off the allegiance of his birth, and assume that of the United States. The general provisions of these laws are, that the alien, at least two years before his application to be admitted as a citizen, shall make oath before a State court of record, or before one of the Federal courts, or before the clerk of these courts, that it is his intention to become a citizen, and to renounce his allegiance to his own Government. At the time of his actual admission, he must appear before one of these courts and take an oath to support the Constitution of the United States, and must renounce and abjure the allegiance of his birth, and also prove to the court by witnesses that he has resided continuously for at least the five years preceding in the United States, and at least one year in the State where the court is held, and that he is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. This done, he is pronounced by the court to be a citizen of the United States, and as such is entitled to all the general rights and immunities which belong to natives. The minor children of naturalized persons, if dwelling in the United States, are included in the parents' change of status. Persons who came to this country minors, and have resided in it for three years continuously before coming of age, and two years next after that period, may be admitted without the previous declaration of intention.

§ 722. In the status of citizenship of the United States are included, then, all free native-born persons except In

dians, and perhaps negroes; foreign-born children of citizen parents; foreign-born persons who have been naturalized according to the laws of the United States, and the minor children of such naturalized persons.

§ 723. It will be noticed that the naturalization laws are limited in their operation to free white foreigners. How far this exclusion extends has never been definitely determined; it of course covers negroes, and was doubtless directed especially against them. It will probably be construed to embrace all races except those which are nearly affiliated to our own stock. History shows that such related races may mingle, and have coalesced to form the most united peoples and most powerful empires; but it has as plainly demonstrated that races entirely dissimilar cannot unite and attain to that homogeneity necessary for a single people and stable government. Thus the Saxons and Northmen in England, the various German tribes and Latins in France, Italy, and Spain, have become assimilated so as to produce compact nationalities. The different tribal elements of the English or the French still retain many of their original characteristics, which are doubtless ineffaceable, but not sufficient to prevent a general reduction to one national life. It may be that the English and some portions of the East Indian peoples, will in time become thoroughly amalgamated, for they both belong to the same Indo-Germanic stock. But if we may trust at all to historical conclusions, no length of common intercourse would ever reduce the English, or French, or Germans, and the Africans, or Chinese, or Polynesians, to one homogeneous people. Mingling as they have for generations with the whites, and impressed by their civilization, and adopting some of their customs, the Indians through the United States, even in the most favorable circumstances, are as completely Indian in their ethnic peculiarities, as when the first Europeans landed on the American shores. These considerations furnish strong, nay, irresistible reasons, for such a construction of

our laws in reference to the naturalization of foreigners, as will establish and maintain the policy of admitting none to the status of citizenship except individuals from races nearly affiliated to our own national Germanic stock. This would cut off Africans, most Asiatics, the nations of the Pacific and East India islands, and probably the Sclavic races of Eastern Europe. I think experience has shown that these latter races are so different from the Germanic, in the ethnic life and force, that they, like the Celtic, can form no complete national union with peoples descended from the German stock.

§ 724. The various States of the Union may adopt, and many of them have prescribed, different rules for the admission of persons to the rights of their own citizenship; for the citizenship of a State, and that of the United States, are not convertible conditions. The citizenship of a State confers its own privileges within the limits of that single commonwealth; the status of citizen of the United States, is coextensive with the jurisdiction of the nation. What constitutes citizens of the various States, I will not attempt to explain in particular. In some, foreigners are admitted after a short residence; in others, they are more restrained. In some, all negroes are entirely excluded; in others, they are all admitted.

§ 725. Having thus described what classes of persons are citizens, I will next state some of the rights which they enjoy, in addition to those which are guaranteed to them in common with all other persons. One of the most important of these is the unlimited right to hold and enjoy property. Of course this right is controlled in each State by the local laws, and not by those of the United States. What persons may hold property in any particular State depends entirely upon the legislation of that commonwealth. By the common law of England, an alien could not hold and fully enjoy landed property. This rule is also in force in the States of the Union, except where it has been altered by statute. In

general only the citizens of a State, whether native or naturalized, may acquire and fully hold, convey, devise, and inherit real estate. Some of the States have abated the rigor of this rule, and extended the privilege to those intending to become citizens. Special legislation has also often been had, permitting particular aliens to acquire and own real estate as though they were citizens. Personal property is not so restricted, but may be acquired, enjoyed, and disposed of in any manner by citizens and aliens with equal facility. This rule is a relic of the feudal policy, which stamped so deep and enduring marks of difference upon lands and movables.

§ 726. The citizen of the United States as such has the right to the protection of his Government at home and abroad. This protection over him when abroad, does not extend to shielding him from the just consequences of his crimes and violations of law in foreign countries; but it follows him wherever he goes as a peaceful traveller or trader, and interposes in his behalf whenever he is oppressed or his rights of liberty, security, or property are unjustly invaded by a foreign government. The extent to which this rule is carried will be best illustrated by a few examples. If the property of a citizen of the United States peacefully trading in another country, should be seized, or confiscated, or destroyed by the foreign officials, in a case where he had not made himself amenable to their laws, so that the seizure was a legal method of punishment, the United States would demand from the foreign government that reparation should be made for the losses sustained by its citizen, and would esteem a refusal a just cause of declaring war. On the other hand, if such seizure were made while the citizen was engaged in violating some one of the laws of the foreign nation, as if he were attempting to evade a blockade, the citizen would be obliged to bear his own loss. This is the law not only of the United States, but is a part of the general code of principles by which nations regulate their intercourse. In many of the European states, all or nearly all

classes of subjects are liable to serve in the army for a certain number of years. Instances have occurred where such foreigners, immigrating to the United States, and becoming naturalized, have temporarily returned to their native country and been drafted into the army and compelled to serve as soldiers. Whenever our Government has been apprised of such cases, it has interposed and insisted on the release of its citizen. Of course, the only method of compelling respect to the rights of its citizens when abroad, after negotiations have failed, is by a resort to war.

§ 727. Certain particular privileges are also given to citizens of the United States by statutes of the Federal Congress, but it is unnecessary to enumerate them; among them is the exclusive right to carry on the coasting trade among the ports of the United States.

The right of citizenship must not be confounded with the right of suffrage, and of taking part in the administration of the Government. This is a special privilege confined to a comparatively small class, which is described in the following subdivision.

## III.

### OF THOSE PERSONS TO WHOM THE POLITICAL POWER OF THE UNITED STATES, OR OF A SINGLE STATE, IS COMMITTED.

§ 728. The Government of the United States, and of each of the several States, being purely representative, the entire political power is committed to a comparatively small portion of the people, who thus represent the majority who have no actual voice in the choice of rulers; and this class itself is represented by the few delegates elected by it to form the various legislative and executive departments of the Federal and State administrations. The class which possesses this privilege is composed in general of the free white male citizens who have attained the age of twenty-one years; yet there are exceptions to this rule.

§ 729. The only branch of the national Government which in theory is elected by popular suffrage, is the House of Representatives; and the Constitution prescribes that the members of this body shall be chosen "by the people of the several States, and the electors in each State shall have the qualifications requisite for the most numerous branch of the State Legislature;" that is, the same persons who are entitled by the laws of a State to unite in the choice of the members of the lower House of their own legislature, shall be allowed to vote for delegates to the National House of Representatives. The Constitution therefore confides to the States the power of determining who shall exercise the right of suffrage in electing members of Congress. It is plain, that mere citizenship of the United States does not confer this right; that while by common consent minors and females are excluded, the State laws may place any limitation upon its enjoyment by males, or may throw open the door as wide as possible. In fact they may limit this political privilege to a small class of citizens of the United States, or may even extend it to persons who are not citizens.

§ 730. As a general rule the electors in each State are the white male citizens of the United States, who have attained the age of twenty-one. One State still, South Carolina, demands a certain property qualification in the voter; Connecticut requires that he shall be able to read; Massachusetts admits all free negroes among the number of electors; New York, only those negroes who possess a certain amount of property; while most States reject them all. Some of the States permit a foreigner to vote before he has resided in the United States the length of time required for his admission to citizenship; while in others the question has been mooted and warmly advocated of entirely depriving foreign born citizens of the right of suffrage. The class of electors who may take a part in the choice of delegates to the House of Representatives is not then defined by the Constitution, nor is it composed of all the citizens, nor even

entirely of a portion of them. Still the proposition is true that a vast majority of this class are male white citizens of the United States.

§ 731. By the theory of the Constitution, the evident intention of the founders of the Government, and the early practice, it was not designed that the President and Vice-President of the United States should be directly or indirectly voted for by the people in such a manner that an elector in casting his ballot should be understood as designating any particular person for either of these offices. Their choice was to be removed from the excitements and distractions of popular elections, and was to be entrusted to the cool and deliberate judgment of a few special electors appointed for that purpose by the several States in such manner as their laws should prescribe. These special electors were assumed to enter upon the discharge of their functions untrammelled by any pledges, and left only to the guidance of their own personal convictions of what were the best interests of the country. Accordingly, in most or all of the States, the electors were originally designated by the legislatures, as they are to this day in South Carolina. But the rapid spread of the idea of the sovereignty of the people has entirely swept away these conservative checks planned by the framers of the Government, so that while the letter of the Constitution is strictly obeyed, its spirit is directly violated in the election of the chief magistrate. This has been accomplished by the abandonment of the choice of the presidential electors to the people of the several States, and by the closely drawn lines of party discipline, by which sets of electors unequivocally pledged to a particular candidate, and directly voted for by the people, have become in fact the mere passive instruments of the majority of the voters in carrying out their will as expressed by the ballot box. This complete change in the manner of electing the President is a remarkable instance of the way in which written laws and constitutions however carefully guarded may be made to

yield to a change in popular feelings and wishes, so that while not a clause is repealed or modified, the effect of the whole is completely transformed. On the letter of the Constitution there has grown up an unwritten law, not indeed enacted by courts, but devised and voluntarily obeyed by those who manage the machinery of popular elections. Under our present customs, the choice of presidential electors has become a mere idle and useless form; and it would be better to abandon it altogether and permit the people to vote directly for the President, or else to conform our practice again to the original meaning and design of the organic law.

§ 732. All other officers of the United States are appointed by the President, except the senators, who are chosen by the Legislatures of the respective States. From the class of male citizens of the United States of the age of twenty-one and upwards, all the civil officers are to be taken, and in a few instances there are further restrictions. The President and Vice-President must be natural-born citizens who have attained the age of thirty-five. Natural-born evidently signifies a birth within the actual limits of the national jurisdiction. Senators must be citizens who have reached the age of thirty, and if of foreign birth, must have been admitted to citizenship at least for nine years. Members of the House of Representatives must be citizens who have attained the age of twenty-five, and if of foreign birth, must have passed seven years since their naturalization. It would be useless to attempt to give the qualifications required of electors and of civil officers in the various States. The general rule already stated is sufficient. The same influences which have caused the office of President to be filled virtually by popular election, have gradually added to the power of the people in choosing State officers. One office after another has been yielded to the direct vote of the electors, until in New York the governor and all heads of departments, the legislature, the judges of all the courts,

sheriffs, clerks, and all other ministerial officers, are chosen at popular elections. Many other States have followed this example, but in some the judiciary are yet saved from the temptations and inevitable influence of party politics and contested elections.

## *Section Second.*

### SOME PARTICULAR CLASSES OF PERSONS, AND THEIR PECULIAR RIGHTS AND DUTIES.

§ 733. Having described the more general rights which belong to all or nearly all the persons of which the commonwealth is composed, I shall in this section state the leading features of the law relating to certain special classes of persons which form a large part of the nation. Two of these classes at least lie at the very foundation of all society, for they compose that unit in all true social organization, the family, and include its primary elements, the wedded parents and the children. The other classes, which are accessory to these, are the guardians, who at the death of parents supply their place, and servants who aid the children in the labors of the family and the services due to the parents. This section is devoted then to the description of the respective status, rights, and duties of Husband and Wife, Parent and Child, Guardian and Ward, Master and Servant.

### I. HUSBAND AND WIFE.

§ 734. 1. THE MARRIAGE RELATION.—The idea of marriage, of the mutual choice of each other by one man and one woman to unite and form one separate family, and be the parents of children who are to be their special care, and are to perpetuate their name, seems to be as naturally implanted in the human race as the idea of language or of religion. The earliest record, which leads us back to the very birth of mankind, tells of marriage from the beginning; and

the histories of all peoples who have a history, disclose its existence. Often it has been debased from its pure ideal, and its simplicity and beauty marred and almost destroyed, by the prevalence of concubinage and polygamy; but still no nation has sunk so low, has so entirely lost the original divine life breathed into humanity, as to be without some approach to that personal choice and separation of two individuals of opposite sex from all others, which constitute this relation. And among those peoples where civilization has made the most progress, whether in ancient or modern times, and especially where the pure morality of the Christian religion has been felt in moulding the institutions and laws, we shall find the marriage tie the strongest, the separation of husband and wife from all others the most complete, the unity of the family the most perfect.

§ 735. We, together with all the nations of Western Europe, derive our notions of the marriage institution as a part of the municipal law, from two sources, the Romans, and the Germans, among both of whom it was carefully guarded by positive enactment, by custom, by the sanctions of religion, and by the general sentiments of the people. I have shown in the former part of this work, that from the very beginning, the Roman law was severe and particular in its regulations of this domestic relation, and that while the Roman people preserved their ancient simplicity of morals and manners, the tie of husband and wife was still kept sacred; that with the growing luxury of the empire, divorces became easy and frequent; but that they were subsequently restrained by the better Christian emperors. The wild Germans held woman in high estimation, and this tribal sentiment was nourished and strengthened by the influence of feudalism, and over the whole of Europe the Church extended her power, and added an element of religion to the merely civil contract between man and wife.

§ 736. (1). *Definition of Marriage.*—Marriage is often defined as a contract with some peculiar incidents. I pre-

fer and adopt the definition given by Mr. Bishop, author of a late Treatise on the Law of Marriage and Divorce. "Marriage is a civil status, existing in one man and one woman legally united for life, for those civil and social purposes which are based in the distinction of sex. Its source is the law of nature, whence it has flowed into the municipal law of every civilized country, and into the general law of nations. And since it can only exist in pairs, and since no persons are compelled, but all who are capable are permitted to assume it, marriage may be said to proceed from a civil contract between one man and one woman of the needful physical and civil capacity. While the contract remains executory, that is, an agreement to marry, it differs in no essential particulars from all other civil contracts. But when the contract becomes executed in what the law regards as a valid marriage, its nature as a contract is merged in the higher nature of the status. And though the new relation may retain some similitudes to remind us of its origin, the contract does in truth no longer exist, but the parties are governed by the law of husband and wife."

§ 737. (2). *How entered into.*—Mr. Bishop sums up the essentials of a valid marriage in a compact form which I quote: 1st, an agreement between the parties; 2d, the observance of the forms required by law; 3d, a sound mind; 4th, the requisite age; 5th, a capacity of the parties to contract marriage generally; 6th, a capacity to contract with each other. The grounds for the nullity of a marriage are the opposites of these: 1st, want of an agreement which the law recognizes; 2d, want of the use of the proper forms required by law; 3d, unsoundness of mind in either of the parties; 4th, want of sufficient age; 5th, want of a general capacity to marry, such as results from the existence of a former husband or wife; 6th, want of a particular capacity to marry between the parties, such as results from consanguinity or affinity. Some of these disabilities render a marriage absolutely void, others, voidable.

§ 738. In describing the legal condition of marriage, we must continually bear in mind the two sources whence the rules concerning it are derived, the common law, and the statute. We must enquire then what, as a foundation, the common law of England has established, and what alterations or additions to this the statute has enacted.

By the common law of England, irrespective of the innovations of the Church or Parliament, the parties to a lawful marriage must be a man and woman, respectively of the ages of fourteen and twelve or over, of sound mind, not related to each other in the direct ascending or descending line, and not collaterally as brother and sister, and neither at the time being bound by any other existing marriage. Marriages celebrated between persons either of whom is under the required age, are voidable, and may be either ratified or repudiated by the party upon attaining that age. Those entered into between persons related to each other as above stated, would be repugnant to the moral sense, incestuous and absolutely void. Those also where one of the parties has a husband or wife still living, are absolutely void, and need no legal proceedings to annul them. The marriageable ages of fourteen and twelve were borrowed from the Roman law, and have doubtless been altered, in most or all of the American States, by statute. In most of those European countries where the Canon law, or the code established by the Church of Rome, prevails or exerts an influence upon the municipal law, persons within the Levitical degrees of relationship are forbidden to marry. This rule was early adopted in England by statute, and has been followed in many of the American States. A violation of this canonical disability, however, only renders the marriage voidable, unless otherwise directed by statute.

§ 739. As the common law regards marriage as based simply upon a civil contract, it requires for its ratification only the free consent and agreement of the parties. This consent may be openly made in the presence of any wit-

nesses, whether official or private, and it may even be inferred from the subsequent acts of the parties toward each other, from their cohabitation, their treatment of each other as husband and wife, their sufferance of others to regard them as such, and the like. It must not be understood that such acts as these amount in themselves to a marriage; they are only evidence, more or less weighty, of that prior consent and agreement which is the essence of a legal marriage. It will be seen then that the contract of marriage, which is made so enduring, and is fraught with such momentous consequences as the complete, lifelong union of the parties, and the birth and education of offspring, and all the other results which flow from the family relation, is left by the common law to be completed with the same ease and informality, as the most simple agreements for buying, or selling, or carrying on any other transactions of life. Wherever the common law yet prevails unaltered, as in the State of New York, this rule still exists.

§ 740. The common law of England was, however, modified from the time of the Council of Trent by the introduction of a rule requiring the presence of a clergyman to render a marriage valid. Subsequently in that country, and in many of the States of our own land, more formalities have been made necessary by statutes, by means of which the free consent of the parties shall be publicly made. Among these are the consent of the parents or guardians of a person under age, the publication of banns, a license from some designated officer, a public nuptial ceremony in church conducted by a minister of religion, or the ratification of the contract before some appointed officer, and the registry of the marriage in public records. It is impossible here to describe with any minuteness and accuracy the various forms made requisite by the legislation of our different States. They are all intended to produce that care and deliberation which should precede and accompany the en-

tering into so solemn, enduring, and momentous a status as matrimony.

§ 741. Still by all these statutes, as well as by the common law, the very gist of the marriage relation, that which gives it binding efficacy, is the free consent of the parties. A marriage contracted by force, or duress, such as threatened violence, or by gross fraud, may be annulled at the suit of the injured party, as any other contract may be set aside for the same reason. But the fraud must be complete; mere deception as to one's rank or station in life, or wealth, or character, would be an insufficient cause for the deceived party to escape from the bonds of matrimony. Public policy requires that these engagements should be neither lightly formed nor lightly broken, and the law refuses its aid to any who have blindly and credulously allowed themselves to be drawn into an unfortunate connection.

§ 742 (3). *Character of the marriage relation.*—The characteristics of the marriage relation are, that it draws the parties from all the rest of society, and unites them into one family, forming new relationships of affinity; that it mingles their blood, and thus inaugurates a new stock of descent with all its complicated effects upon inheritances of property and relationships by consanguinity; that by the common law it effects a legal unity of the husband and wife, merging her legal existence for the time being almost entirely in his, and erecting him as the head of the family, bound for its support, and in a great measure responsible for its acts; and that it cannot, like mere civil contracts, be dissolved by the mutual consent of the parties, but must, in general, last until the death of one of them. Marriage thus changes the legal relations of the parties to each other and to all the rest of mankind. It is the corner stone of the family, around which are grouped the children with their peculiar relations, in which are centred the ties of blood, and by which are determined many of the disposi-

tions of property. It gives the husband and wife rights and duties toward each other's persons and property; it gives them, as parents, rights and duties toward the persons and property of their children; and to the children rights and duties toward the persons and property of the parents. A sketch of these several obligations will form the greater part of this section.

§ 743. (4). *How the marriage relation may be terminated.*—It is of course terminated by the death of either of the parties. Some marriages are absolutely void from the beginning; they never bore the character of a lawful wedlock, and whenever called in question in any collateral proceeding respecting the dispositions of property or the rights of persons, are treated as a nullity. Others are voidable from some cause existing at their inception. They are as truly marked by an inherent defect as those of the former class, but must be declared to be null by a competent court, in a suit directly instituted for that purpose by the injured party. As a general rule those marriages affected by civil disability, such as the existence of a husband or wife of one of the parties, are void, while those affected by canonical disability, such as affinity or consanguinity within the prohibited degrees, are only voidable. To this rule there are however some important exceptions, for marriages contracted by force or fraud, and those in which one of the parties is under the marriageable age, are simply voidable. The person aggrieved by the fraud or force, or the one under age, may still ratify the contract, and this consent would seem to relate back to the inception of the relation and render it valid. In the case of both void and voidable marriages, the connection is dissolved because it was never lawfully entered into; there never was free consent between persons legally capable of matrimony; and in some cases the judicial power of the State is invoked to remove all doubt, and establish the invalidity.

§ 744. Divorce on the other hand is the dissolution of a

marriage fairly and lawfully contracted, for some cause arising subsequent to its inception. Two species of divorce are known to our law, that which is absolute (a vinculo matrimonii), by which the marriage tie is completely dissolved and the parties restored to their former condition; and that which is limited (a mensa et thoro), which is a legal separation of the husband and wife, destroying the family, ending the cohabitation, but not freeing either party from the restraints upon a subsequent marriage.

§ 745. Until the year 1858, it was long settled by the English law that no absolute divorces could be granted except by act of Parliament, and then only at the instance of the husband on account of the adultery of the wife, and in a few cases at the suit of the wife for the adultery of the husband attended by aggravated circumstances. When such an act was obtained, both parties were entirely free from the contract, and were at liberty to marry again. But the ecclesiastical courts had power to grant limited divorces on account of adultery, or cruel treatment, or wilful desertion for two years or upwards. The cruelty which will warrant a judicial separation must consist in something more than unkindness, harsh words, and ill-temper; it must be accompanied by some force and violence, so as to endanger the life, or health, or bodily safety of the injured party. The adultery of husband or wife will not be deemed a sufficient ground for a divorce of either kind, if the complainant has been guilty of the same offence, or has voluntarily cohabited with the offender after a discovery of the fault. After an agitation prolonged through many years, the English law of divorce was changed in the year 1858 by an act of Parliament. A special court was erected having cognizance of such causes, and all the jurisdiction of the ecclesiastical courts in these matters was transferred to the new tribunal. In addition to the limited divorces above described, an absolute divorce may be obtained by the husband for the adultery of the wife, and by the wife for the

husband's incestuous adultery, or bigamy with adultery, or adultery coupled with gross cruelty or aggravated circumstances, or adultery coupled with wilful desertion for two years.

§ 746. In our own country the legislation of the different States on the subject of divorce is exceedingly varying and conflicting. In some, absolute divorces are denied except by an act of the legislature; in others, the law admits the marriage relation to be dissolved with the utmost facility, for such causes as adultery, cruel treatment, desertion for a comparatively short time, and even such disagreements and incompatibility of temper as render it impossible for the parties to live happily together. The law of the State of New York may be taken as a type of the more conservative legislation upon this subject, and its rules are perhaps as nearly perfect as any that can be devised. Absolute divorces are granted to either husband or wife for the adultery of the other, special pains being taken to prevent collusion, and to establish the fact of the actual guilt. The marriage tie is then dissolved, and the complainant is permitted to marry again, while the offender is still forbidden to marry during the lifetime of the former husband or wife. Limited divorces are granted on account of cruel and inhuman treatment, or wilful desertion by the husband and refusal to provide for the wife. In all cases, the English rules stated above in regard to the innocence of the applicant, and a pardon of the fault, have been adopted, and doubtless also prevail in all the other States where divorces are granted by the judicial action of the courts. When a divorce of either kind is granted to the wife, the husband may be compelled to make her a yearly allowance out of his property, which is technically called alimony.

§ 747. 2. Rights, Powers, and Duties of Husband and Wife.—The rules of the common law which define the effects of the marriage relation upon the rights, powers, and

duties of the parties thereto are logical and severe. They are all based upon the principle of the complete legal unity of the spouses, and the theory that this unity consists in the merging of the legal personality of the wife in that of the husband, and not in any community or partnership of interests, where each has an equal voice. This idea was incorporated very firmly into the framework of our law as it was built up by judicial decision, and the various regulations of personal rights, and rights to property, are deductions more or less direct from this premise.

§ 748. The husband then is the legal head of the family, and clothed with all the powers which flow from this position; his will is the source of domestic law; he is entitled to the presence, attention, affection, and obedience of the wife. As the municipal law, however, by its remedies can only reach outward acts, a portion of these duties alone can be enforced by legal proceedings. He has the right to fix the place of abode, and to change it, and the wife must follow; and so strict is the law upon this point, that it declares the domicil of the husband to be that of the wife, even when she actually lives apart from him, unless judicially separated. The wife can bring no actions in her own name; in all suits in which she is interested the husband must be joined with her if she be a party, and in a large portion he is the only proper party. On the other hand she is not liable to be sued, even for a claim arising before marriage.

§ 749. His duties grow out of these rights of headship. Upon him alone the family depend for support; he must provide the wife with necessaries suitable to her situation and his condition in life, and is in general bound for debts contracted by her for such necessaries. He is responsible for the frauds and wrongs committed by his wife; solely liable if done in his presence, or by his order; otherwise jointly liable with her. Her debts contracted before marriage may be recovered from him, but his responsibility ceases at her death.

§ 750. The rights and duties of the wife are the correlatives of those of the husband. She is entitled to protection and support; she must yield obedience; her will is subordinate to his. She cannot engage in transactions with third persons in her own name; she can only bind her husband for necessaries; any credit given to her beyond this is entirely at the risk of the person furnishing the articles and giving the credit.

§ 751. Another very important rule of the common law, deduced from the principle of the unity of husband and wife, was, that neither could be a witness for or against the other in any judicial proceeding. This rule is a marked instance of the scrupulous care of the English law to segregate families, and preserve inviolate their unity, and the perfect trust and confidence which should prevail in them, and which are so necessary to their peace and happiness. The law thus endeavored to remove all possible opportunity for the disputes between husband and wife to be brought by them into the courts, and to throw them back upon their own domestic forum for settlement and reconciliation. The principal exception to this rule, necessary to preserve the public peace, was, that in a criminal proceeding against one spouse for violence done to the other, the injured party was admitted as a witness to prove the offence.

§ 752. The same fundamental principle exerted its influence on the rights of property. The husband acquired all the personal effects belonging to the wife at the time of the marriage, and all which accrue to her from any source during its continuance. This becomes his own, to be disposed of at his pleasure, and is of course subject to be taken by his creditors in satisfaction of his debts.

All lands held by lease, and all debts due to the wife on bonds, notes, contracts or otherwise, technically known as "things in action," also pass to the husband, but with this limitation that they do not in general become his until he actually reduces them into possession, as by collecting the

money due on a bond, or substituting a new security in the place of the one given to the wife. If he die before this is done, they remain to the wife; if she die before it is done, they form a part of her estate.

The lands owned by the wife absolutely, or held by her for life, do not become the husband's, but he is entitled to their possession and management, and to their rents and profits during the marriage, and if she die before him, this right continues for his life as to the lands of which she was the absolute owner, provided any children had been born capable of inheriting the property from her.

§ 753. The common law gave the wife no right in, or ownership over, her husband's property during his life, which amounted to anything more than a mere possible claim. But upon his death a right which had its inception during his life, became fixed, absolute, and tangible. This is known as dower. Dower is the right which the widow has to enjoy for her life the one third of all the real estate of which the husband was absolute owner during the marriage. This right then has its origin while the wedlock continues; and at the time of the marriage immediately applies to all lands then owned by him, and afterwards attaches to all of which he becomes owner, and can be destroyed by no act of his, not even by a sale of the property, or by a will devising it to a third person. The wife however may divest herself of it. In the United States this is done by the wife executing the deed of land in connection with her husband, and acknowledging the instrument, separate and apart from him, and before some proper officer, to have been done by her voluntarily, without any fear or compulsion. The right of dower is much favored by the common law, and the rules protecting it are very stringent. It is regarded as some compensation out of her husband's property for the interests which she has surrendered to him, and as a provision for her maintenance after she is deprived of the support of the head of the family.

The wife has also a possible claim, or expectancy, in the personal property of her husband. If he should die intestate, she is entitled in England to one third of his personal property, if he leaves children living, and to one half, where there are none; but this expectation may be entirely defeated by will. In the different States of America the same rule prevails, but variously modified by statute.

§ 754. As a corollary to these legal relations resulting from marriage, the husband and wife were incapable by the common law of entering into any valid contract with each other in respect to themselves or their property. Even a deed from one to the other was void. Contracts made by them before the marriage, reserving interests to the wife, also became nugatory, for the husband was by law invested with the absolute ownership of the wife's personal property, and with the power to appropriate to his own use all benefits accruing to her from contracts.

§ 755. This sketch of the general rights, powers, and duties of the parties to the marriage relation, shows that the rules of the common law are logical and strict, and well calculated to preserve the integrity of the family. When they have not been altered by judicial decision or by statute, they still prevail in England and the American States, and form the foundation of that portion of the municipal law which affects the domestic relations.

§ 756. But many of these rules were long ago felt to be harsh and inequitable. Their operation was more suited to a rude age and to a somewhat imperfect civilization, than to the times when woman had been raised by education and by the sentiments of the nation to an equality with man. They afforded too many opportunities for the wife to be oppressed, and her property squandered, by a careless or criminal husband. As the courts must always reflect the wants of the people and the civilization of the age, it was both natural and inevitable that modifications and additions should be made by judicial decision, in these strict require-

ments of the law. This has been done by the courts of equity, and a system of regulations, supplementing those administered by the law courts, has been built up, which, forming a part of the general municipal law, has to a great extent changed the relative rights of the husband and wife in regard to her property, or, to speak more accurately, has rendered it possible for them to change these rights. These modifications of the law have not interfered with those rules which define the mere personal relations of husband and wife; they have not abrogated his legal supremacy as head of the family; nor have they attempted in terms to repeal or set aside the doctrines of the common law as already stated. The courts of equity do not proceed in this direct antagonistic manner. Assuming as the basis of their action the doctrine of trusts, which was shortly described in Chapter II. of Part First, and developing this idea, they have simply given force and effect to contracts made between the intended spouses before marriage, or between the husband and wife after marriage, by which the wife's property or some portion of it, or even some part of the husband's, was agreed to be reserved to her for her own separate use, free from his control. Such marriage contracts are technically known as settlements, and are generally made by the intervention of some third person as trustee, to whom the property is conveyed to be held by him for the wife's use. They are very frequent in England. But the aid of a third party is not absolutely necessary, for the courts of equity will compel the husband himself to act as trustee, and will treat property in his hands, which has been settled upon the wife, as her separate estate, and will direct him to manage it for her benefit. The result of this action of the courts of equity is, that parties contemplating marriage, and even those already married, when the rights of creditors of the husband are not thereby prejudiced, may, by a contract, withdraw the property of the wife, or that of the husband settled on her, from the operation of the strict rules of the common

law, and may clothe her with rights of ownership over it, untrammelled by any claim or interference from the husband. In respect to such property the rules of equity treat her as though she were a single woman, and they have thus in effect gone far towards a practical repeal of some of the requirements of the ancient law. As the wife is considered a single woman in regard to such property, she is permitted to act towards it in a great measure as though she were unmarried; to contract obligations and debts concerning it with third persons, which the courts of equity will enforce against the property, though not against herself personally. The elementary nature of this work does not permit me to enter with any minuteness into the numerous and refined rules which have been established on this subject. In England they occupy a large portion of the municipal law affecting the rights of husband and wife; and the same doctrines have been adopted to some extent in most of the United States, but their importance has lately been greatly lessened, and their application to our society destroyed, by legislation far more sweeping and radical than any of the innovations of the equity judges.

§ 757. While this legislation has been adopted at comparatively recent periods by most of our commonwealths, and while its principles and tendencies are the same in all, there is but little similarity in its details. A very few of the States still preserve the common law doctrines untouched except by the modifications introduced by the courts of equity. In others, these modifications have been incorporated into the statute book. In others still, the wife's property is made free from the effect of the husband's debts, but is left wholly or partially under his control; while in many, the wife is clothed with absolute ownership over all her possessions as though she were a single woman. The legislation of the State of New York may be taken as an example of this latter class, for it is the most marked in its character of any, and most defiantly attacks all the time-

honored principles of our common law. By statutes of that State passed in the years 1848, 1849, 1860 and 1862, it is enacted, that all property real and personal of every description belonging to the wife at the time of her marriage, or which may accrue to her after marriage, including her earnings acquired in business, is absolutely her own, entirely free from all control or claim of her husband, and under her management as though she were unmarried. As such owner, she has complete power to sell and dispose of it in any manner, to make contracts concerning it, and to bequeath and devise it by will, without her husband's consent. She may also, in her own name, carry on any business or trade, and the profits will be hers, and the losses will fall upon her property and will not prejudice that of the husband. She may bring all suits in her own name, either to enforce her rights of ownership or to recover damages for any injuries to her person, reputation, or property, and the amounts so recovered belong to her. Suits may also be brought against her, without joining the husband as a party, and should judgment be recovered, an execution may be issued to enforce the demand out of her separate estate. Her contracts made in respect to her own property are not binding upon the husband, nor can he by any act defeat or injure her rights of ownership. The husband is still left under the common law obligation to support her, and she still is entitled to her dower in his lands.

§ 758. These several provisions plainly have the effect to render marriage a mere union for the production and management of children. As to their other legal relations, the husband and wife have not even the united interests of a partnership; for in that, the several partners embark their property together, and each is bound to promote the advantage of the whole, and to increase the common fund, which is to be divided among them. But the family in New York has no such community of interests. The husband is still the nominal head of the household; he determines their

domicil; he must provide for their maintenance; but one of the greatest safeguards to a complete unity of sentiments, of hopes, of plans, and of labors, is utterly destroyed. To have been entirely consistent in their work of change, it would seem that the legislature should have required the wife to contribute from her property towards the support of herself, her husband, and her children. The State of Louisiana has adopted a system entirely unlike that of the common law, or that embodied in recent statutes of New York. It is substantially borrowed from the provisions of the French Code Civil regulating marital rights. Texas and California have to some extent followed the legislation of Louisiana.

§ 759. 3. The French Law of Marriage.—It will be instructive to compare that portion of our municipal law which defines the rights and duties of the parties in the marriage relation, with the law of other countries, which may be based upon different principles, and expressive of different ideas. The provisions of the French Code Civil afford the most suitable opportunity for such comparison, especially as they form the foundation of the legislation of some American States. I will therefore add an abstract of the general features of this department of the French law, so as to exhibit its essential characteristics, without attempting to give the minuter details which provide for particular cases.

§ 760. The Code Civil establishes certain general rules to govern all marriages which are not expressly excepted from their operation by a marriage contract. It also permits parties contemplating marriage to enter into a formal written agreement, in which they may make other provisions respecting their property. These contracts cannot, however, interfere with any of the personal rights and duties of the spouses as established by law, but are analogous to the marriage settlements used in England. When no ante-

nuptial contract has been made at all, or none expressly waiving these provisions of the law and adopting others, the code creates a community of goods, or partnership, between the husband and wife in respect to their property, which is governed either by the general law, or by special stipulations of their contract. The contemplated husband and wife may, however, by their solemn agreement refuse to place their property in common, leaving it the separate estate of each, or the wife's property may be settled upon her as dowry. These three cases will be described separately.

§ 761. Community or partnership of property between husband and wife exists in all cases except when the contrary is expressly agreed by them. In this partnership are included all the personal property belonging to either spouse at the time of marriage; all that comes to either of them during the marriage by inheritance or donation, unless the donor otherwise orders; all the gains and profits and fruits of industry acquired by either; and all immovable property bought within the same time. Immovables owned by either party at the commencement of the wedlock, and those inherited or donated, do not enter into this community, but remain the separate estate of the one to whom they belong. This common property is chargeable in general with the debts owed by each party at the date of the marriage, and with those contracted by the husband, or by the wife with the husband's consent, while the partnership lasts.

§ 762. While the ownership of the husband and wife in this common property is equal, they have not the same right of control over it. He alone manages it, and may sell or pledge it without her consent. He has also the management of all her separate property which is not included in the community, but cannot dispose of her lands in such condition, without her consent. On the other hand the wife can neither bind herself nor the partnership until she has been authorized to do so by law.

§ 763. This community of goods between husband and wife is dissolved by the death of either, by a divorce, by a judicial separation similar to our limited divorce, and by a judicial proceeding instituted by the wife to terminate the partnership. After the dissolution, the specific claims of the husband and wife upon the common fund, arising from any cause, are first satisfied, those of the wife taking precedence. When the dissolution is the result of death, the heirs of the deceased succeed to all of his or her rights in respect to the property. These deductions having been made, the residue of the fund is equally divided between the two married parties, or between the survivor of them and the heirs of the one deceased, and one half of the debts of the partnership are chargeable upon each of the two persons, or classes of persons, who have shared the property. At the dissolution, the wife has also the right, under certain restrictions, to renounce her interest in the partnership, in which case she abandons all claims upon the common property, except for her wearing apparel, and is freed from all liability for its debts. Persons entering into the marriage relation, and adopting the community of goods, may still variously modify these requirements of the law by special contract. Among the changes so made the following are the most important; that the community shall only embrace purchased property; that it shall only include that owned at the date of the marriage, or that subsequently acquired; that lands shall be included in it in the same manner as personal property; that the parties shall pay their debts separately before marriage; and that they shall have unequal shares at the dissolution.

§ 764. In the class of marriages termed dotal, in which the community of goods is rejected, the dowry is the separate estate which the wife brings to the husband, and which is irrevocably settled upon her by the nuptial contract. This dowry may include all of her present and future property, or her present property alone, or a part of

it, or even a single article. The husband has the entire management of it during the marriage, and may enjoy its proceeds and profits. Lands included in the dowry cannot in general be sold or pledged during the marriage, either by the husband, or by the wife, or by both acting together. To this rule there are some exceptions, principally intended to relieve the wife in her necessities, and aid her in the support of herself and family. At the dissolution of the marriage from any cause, the husband or his heirs are bound to restore the dowry to the wife or her heirs. There is another class of marriages, in which the property of the parties does not enter into community, nor is the separate estate of the wife settled upon her as dowry, but it is not necessary to describe them more particularly.

§ 765. In respect to their personal rights and duties, married persons assume the obligation of nourishing, supporting, and bringing up their children. They owe to each other fidelity, succor, and assistance. The husband owes protection to the wife and the wife obedience to her husband. He determines the domicil, and is bound to furnish her with necessaries suitable to his means and station. The wife cannot sue or be sued in her own name, nor in general enter into contracts, without his consent, but upon his refusal, she may be authorized by a judge to do either of these acts. She may carry on a separate business, so as to become a public trader, in which case she may bind herself in relation to her trade without her husband's consent, or even bind him, if a community of goods exists between them. She may make a will without his authority.

§ 766. The French law of community of goods between husband and wife, is seen, by the foregoing outline, to be quite complicated, but its provisions are certainly more just than those of the English common law, for they respect the wife's rights of ownership, and do not compel her to yield all her possessions into the absolute dominion or complete control of the husband, and at the same time they are more

politic than the recent legislation of many of the American States, for they preserve the unity of interests in the husband and wife, and have a strong tendency to influence each party to labor with a common design to promote the material welfare of the family.

## II. PARENT AND CHILD.

§ 767. The perfected family, consisting of husband and wife and their offspring, is the source of many legal rights and duties resulting from the parental relation, and of many more moral obligations which our law does not attempt to enforce, but leaves to the influence of natural affection. The municipal law takes cognizance only of those rights which it assumes power to make effective by its remedial measures, and to these alone our attention will be directed. We are then to enquire what are the general legal rights, powers, and duties of parents and of children.

§ 768. 1. *The Parent.*—The moral responsibilities which rest upon parents are of the most weighty character, and to some of them the law adds its sanctions. In thus demanding from the parents a compliance with certain requirements, the law looks chiefly to the father as the one who is charged with duties, and clothed with powers. As he is the head of the family, it is just that, during his life, he should bear whatever burdens, and assume whatever prerogatives, may be connected with his position. At his death, some of his functions pass to the mother, and her powers have been variously altered and enlarged by the statutes of many of the American States.

§ 769. The legal relations between parent and child continue from the latter's birth until it arrives at the age of twenty-one, and then absolutely cease. The foundation of these relations is the duty resting upon the parent to support his offspring. This support is not limited to a bare maintenance, but it must be suitable to the situation and

means of the parties. As the law regards its subjects only as members of society, and endeavors to protect that society, as far as possible, from injury, it requires the parent to educate his children, so as to fit them for their social duties. These demands of the law might have little power over their objects, unless some means were devised to enforce them, and this is done by making the parent liable for such necessaries for support and education, as may be furnished to a child whom he has abandoned or neglected. He is not however bound even for necessaries furnished to a child who lives in his family, except when an actual authority to procure the articles may be inferred; and this would be entirely a question of fact, depending upon the circumstances of each case. The duty of support ceases when the child has attained his majority, and the law does not compel the parent to leave any property to his children, either infant or adult, upon his death, or to make any provision for their maintenance.

§ 770. Corresponding with these duties are the rights to control the persons of the children under age, to demand and receive their labor and services in the family, and to appropriate their earnings. But when a minor child has been suffered permanently to depart from the household, and to support himself by his own industry, so that a discharge from the parental power, called emancipation, will be inferred as a matter of fact, his earnings become his own, and his father loses his legal claim to them. The parents do not as such possess any power of control over their children's property, but generally have the prior right to be appointed the guardians, and in that relation to manage it.

§ 771. 2. *The Child.*—The children owe to their parents obedience and assistance during their minority, and, if not emancipated by an act of the father, their services and earnings are his. When the child has attained his majority this duty of contributing his labors to the aid of the family

ceases, and the law does not in general lay upon adult children any obligation to support their parents. In this respect the French law differs from, and is greatly superior to our own, for it declares that children of any age owe a maintenance to their fathers and mothers and other ancestors who are in want, proportionate to the necessity of the party who claims it, and to the fortune of the one who grants it. Sons-in-law and daughters-in-law are placed under the same liability toward their fathers-in-law and mothers-in-law.

§ 772. Children under the age of twenty-one are termed infants, and, from a tender regard to their interests, are deprived of many civil powers which belong to persons of full age. They are in general disabled from entering into valid contracts, making sales and purchases of property, incurring debts, or doing other acts which shall be binding upon them either during or after the term of their pupilage. The acts of an infant, which would in other cases create a legal responsibility, are, as to them, either absolutely void, or simply voidable. When voidable in their nature, they must be ratified or disavowed by the party after he arrives at age, in which case the ratification or disaffirmance relates back to the time of the transaction, and renders it either a complete legal obligation or a nullity. It is by no means always easy to determine whether any particular act of an infant shall be included in one or the other of these classes. As a general rule, whatever may confer a benefit upon him will be considered as voidable only. Contracts for necessaries, however, made by an infant not living with a parent or guardian, may be enforced against him, and he is thus legally liable for food, clothing, medical aid, and education suitable to his station, furnished at his request; but if he live with a parent or guardian, he cannot bind himself even for such supplies. Liability for the commission of crimes is not discharged by the mere fact of infancy, but rests even upon young children who are of sufficient age and intelligence to understand the nature of the acts done by them.

The various rules of our law in reference to the parental relation are plainly all derived from the principle of affording protection to the child, and of conferring authority upon the parent sufficient for that purpose.

### III. GUARDIAN AND WARD.

§ 773. When the father dies leaving infant children, and the protection of the family head is thus withdrawn from them, his place is supplied by a guardian, who exercises some of the paternal powers over the persons and property of the minors, who are known as his wards. A guardian is also necessary, even during the lifetime of the father, to take charge of such property as an infant may possess in his own right. These substitutes for the natural protector of the family are of very ancient origin. Among the Romans they were called Tutors, and were appointed by the last will of the deceased, or by a judicial magistrate, or succeeded to their office as a matter of right from their relationship to the children. During the prevalence of feudalism in its purely military aspect, the lord was the guardian of the infant heirs of his deceased vassals. After the severity of the military rules was mitigated, and soccage tenures became common, the right of guardianship devolved by law upon the nearest relation by blood to the child, to whom the inheritance could not possibly descend; and therefore if land descended to the heir on the part of the father, the mother or other next relative on the part of the mother was clothed with the duty; but if the land descended from the mother, the father or his next of blood became guardian.

§ 774. These remains of the old English law do not exist in this country, and we have only two species of guardians borrowed from the Roman jurisprudence, those designated by a last will, and those appointed by a court. A father may name a guardian over the estate and persons of his minor children in his last will, and the rights and duties so conferred will continue until the wards arrive at the age of

twenty-one. The English Court of Chancery and the Equity Courts of the United States have long exercised, as a part of their peculiar functions, a special care and control over the interests of infants, and, as a necessary consequence, have acquired a jurisdiction to supply the loss sustained by the death of a father. The Surrogate Courts, Probate Courts, Orphans' Courts, and other tribunals created by statute in the several American States, to superintend the settlement of the affairs of deceased persons, are clothed with the same jurisdiction. The exercise of this judicial power is very frequent, and by far the greater number of guardians derive their authority from some one of these courts. Classes of persons are designated by statutes in all or most of the States, from which the selection must be made in order, the preference being given to the mother, and after her to other near relatives.

§ 775. The person thus appointed, whether by will or by a judge, as far as possible takes the place of the father. He has control over the person of the ward, and must superintend his education, but is not bound to furnish a support out of his own property. He is a trustee of the real and personal estate of the infant, with the general power of management, but without authority to sell lands. In the exercise of his duties he acts in some measure as an officer of the Court of Equity, or other tribunal which appointed him, and in some cases must look to it for specific directions, and in all cases must so conduct himself that his acts will meet the judicial approval. In the discharge of his trust, he is strictly bound to a perfect good faith. He is not only forbidden to use the property for his own benefit, but is liable for a neglect to manage it to the advantage of his ward. The Equity and Probate Courts have complete power to enforce this responsibility, by calling him to account, at any time during the continuance or at the close of his trusteeship, and ever by removing him from his office for incompetence or unfaithfulness.

### IV. MASTER AND SERVANT.

§ 776. The relation of master and servant is generally classed with those of husband and wife, and parent and child, but does not strictly belong in that division of the municipal law. The legal rights, powers, and duties of husbands, wives, and children are the necessary incidents of their peculiar status, and do not flow from any agreement of the parties themselves. The law, by its own force, separates them from society at large, and places them in a condition different from that of other persons. On the other hand, the relation of master and servant is entirely a creature of contract, and its incidents are those of the general law of contracts, applied to the particular case of personal hiring. The only species of civil service which affects the status of the individuals included within it, is slavery. I shall therefore defer the consideration of this subject until I treat generally of the obligations which arise from contracts.

# CHAPTER II.

## OF PROPERTY.

### SECTION I.

#### OF THINGS WHICH MAY BE THE OBJECTS OF PROPERTY.

§ 777. THE word property may be employed in two very different senses; and that we may clearly understand the subjects embraced in this chapter, we should carefully distinguish these meanings, and having adopted one of them, restrict ourselves to it. As often used, it refers to the things themselves which are the objects of ownership. We thus speak of real and personal property, meaning lands and goods. Strictly, however, the term denotes the dominion or ownership which may be exercised over things. These two significations are indiscriminately given to the word in many standard treatises of English and American law. The writers on Roman law, however, never confound subjects so entirely different, and are careful to discriminate between the thing which is the object of property, and property itself.

§ 778. Using the word in this strict sense, I shall endeavor to present an outline of the law of property, so as to give a comprehensive view of its general principles, while many of the particulars in which these principles have been applied, will be passed over in silence. To

this end I shall treat, 1st, of the things which may be the objects of property, and their generic classes; 2d, of the methods by which property may be acquired and parted with; and 3d, of the different kinds and degrees of property in things, recognized and regulated by our municipal law. I have then in the present section to describe the things which may be the objects of property, and their generic classes as established by law.

§ 779. Some things are not capable of being owned. The law does not permit any exclusive dominion over them, any such right in one person as debars others from the same privileges. It recognizes and protects a right to use and enjoy; but that use and enjoyment ended, the thing must be abandoned to all mankind. The air and running water are examples of this class. But almost all existing and possible material things, and rights connected with or growing out of them, are admitted to be objects of individual ownership. Any inquiry into the origin of this universal right of property would be foreign to the design of this work, and belongs rather to treatises on natural law.

§ 780. The English and American municipal law separates the things which are the objects of property, into two generic classes; those which are called personal, or movables; and those which are called real, or immovables. This division is not merely formal, for the methods of acquiring and transferring dominion in things real and things personal, and the species of ownership which may be exercised over them, are very different. The origin of the deeply drawn line of demarcation between movables and immovables has already been explained in the chapter upon the feudal system.

§ 781. 1. *Things which are personal.*—The English technical term for this class is chattels; that of the modern jurisprudence of continental states of Europe is movables. In it are included all things movable and temporary in their nature, and which may therefore be spoken of as at-

tending the owner's person, and also some species of interests in lands, which, though not strictly movable, are considered inferior to those embraced in the class of things real. Things personal are conveniently subdivided into three subordinate groups. 1. The first consists of simple chattels, such as goods, animals, money and all other objects strictly movable which have a material existence. 2. The second group is composed of those interests in land which can only last for a certain specified time, and which are called chattels real. They are rights over lands held by lease, which must terminate at the end of a given number of years. This classification of interests in lands with mere movables is not natural, but is one of the results of the feudal ideas, which considered all estates which must cease at a certain time, as inferior in quality to those whose duration was uncertain. 3. The third subdivision includes objects of property which have no material existence, and which are termed things in action. They do not consist of things themselves, but of the right to obtain things, and reduce them to possession. As examples of this class, I will mention debts secured by a bond, note, or any other contract written or verbal, and damages due for the non-performance or other breach of a contract, or for any wrong which may be legally repaired by damages. In all these cases it is not the money or other article involved in a thing in action, which is the object of property, but the right to enforce the obligation and obtain that money or other material.

§ 782. 2. *Things which are real.*—The things embraced in this division are fixed and immovable in their nature, and, like those in the preceding class, may be either material objects, or rights connected with and growing out of them. With a few exceptions, they may be described as land, which, in its legal signification, refers not only to the soil of the earth, and whatever is found in its bosom, but to all that is permanently affixed to its surface. In addition to all that is included in the general term land, some

movable articles, such as heirlooms, which descend to the heir, or are inherited, are also considered as belonging to the class of real things, because, though not actually affixed to the soil, they have such a legal connection with it, that they partake of all its properties. This latter species of immovables can hardly be said to have an existence in fact in the United States, but rather belongs to a different condition of society, in which family ties and family traditions are more carefully preserved than with us.

§ 783. The immaterial or incorporeal objects of property embraced in this general division, are rights growing out of and connected with lands. Those recognized by our municipal law are rent, and a peculiar class of interests technically known as easements. Rent is a certain yearly profit issuing out of lands, as a recompense for their use and enjoyment. This legal term should be carefully distinguished from the common use of the same word. It does not signify the money, or other articles paid by the occupant to the owner of the land, for those would be things personal, but the right in the owner to demand and receive this money, and as such it is an interest connected with lands. Easements consist in certain rights belonging to one person, which interfere with the land or buildings of another. Of course no one could have an easement growing out of his own land, for his ownership would give him absolute dominion over the soil and all its adjuncts, to use them at his own pleasure, and anything which under other circumstances would be an easement, in his case would be simply an exercise of his absolute right of proprietorship. The most common and important of easements is the right of way, which is the right of private travel over another man's ground.

§ 784. 3. A third class of things are sometimes considered as real and sometimes as personal. The general rule demands that whatever is affixed to the soil or to buildings, as fences, shelves and partitions in a house, and the like, became a part of the land itself. To this there have been ex-

ceptions introduced by the judges in more modern times, to promote justice and especially to encourage trade and manufactures. Many things may thus be fastened to the ground or to a structure by an occupant of land, and still preserve their character as chattels. Yet under some circumstances they would be considered as a part of the realty. As a general rule when such articles were affixed by a former proprietor, on his death they accompany the land and descend to the heirs; but if they were erected by a tenant or lessee, they remain personal things, and may be removed by him and do not pass into the ownership of the landlord.

Whatever things are completely separated from the land, as gathered fruits and grains, felled trees, quarried stones, and the like, change their character and become movables.

## SECTION II.

### METHODS OF ACQUIRING PROPERTY IN THINGS.

§ 785. From defining the generic classes into which things are divided, a natural order leads us to consider, in the next place, the modes by which property in them may be acquired. Some of these methods are common to both classes, others are appropriate to one only. Many of them possessing points of resemblance, they may be arranged in three general divisions. The first division embraces those cases where a person acquires property entirely by his own acts, without any connection with or transfer from another immediate owner; the second, those cases where property is acquired on the occasion of the death of a former owner; and the third, where it is acquired from a former living owner. The latter two of these groups furnish by far the greater number of instances of the transmission and acquisition of property.

## I.

### WHERE A PERSON ACQUIRES PROPERTY ENTIRELY BY HIS OWN ACTS, WITHOUT CONNECTION WITH OR TRANSFER FROM ANY OTHER IMMEDIATE OWNER.

§ 786. Property may thus be acquired by four different methods; by occupancy; by prescription; by natural increase; and by one's own labor. These modes have certain common features. They all rest for their efficacy upon the acts alone of the one who acquires property; they do not depend upon any transfer actual or constructive from a prior owner; in fact they make no reference to any former right of property in another person. They are based partly upon principles of natural law, and are partly the results of positive legislation.

§ 787. 1. *Occupancy.*—This may justly be considered the most ancient of all modes of acquiring property in things, and as the very foundation of all private ownership. It involves the principle of natural law that the first possessor of any thing becomes entitled, by that act of possession, to the entire control and dominion over it. But in the legislation of civilized countries, when society is settled, and the rights of individuals are clearly defined, mere occupancy gives place to other and more formal methods, and nearly disappears. Our law does not recognize it as a source of property in immovables. Whatever lands in the United States are not allotted to individual proprietors, belong either to the nation, or to the separate States. Land which had been the object of private property, would revert to the State, if, for any reason, or under any circumstances, no persons could be found in whom the right of ownership legally existed. It would not be abandoned, so that a stranger might occupy and thus succeed to an absolute dominion over it. This return of land to the Government is called escheat, and happens when an owner dies without a will, and without heirs who can legally inherit his estate.

But mere occupancy still gives a right of property to the finder of chattels which have been abandoned, or lost and unreclaimed by a former owner. To the same source must be referred the right of ownership which rests in the captor of wild animals.

§ 788. 2. *Prescription.*—This method of acquisition bears a general resemblance to that by occupancy, but is distinguished from it in one very important particular. By the latter a title or right to the thing commences at once from the mere fact of prior possession; by the former a long-continued possession, either indefinite in time, or protracted through a fixed period, is necessary to confer absolute property. Prescription, therefore, is the uninterrupted possession of a thing by one's self, or ancestors, or predecessors, with a claim of property, for such a length of time as the law requires to establish complete ownership. Among the Romans, as we have seen, it was a very common mode of acquiring property, one year's possession of movables, and two of lands, being anciently deemed sufficient. These periods were subsequently much enlarged.

§ 789. The English common law admitted prescription as a source of ownership only in those rights connected with land called easements, and required that the possession should have continued from a time beyond the memory of man. Thus one proprietor might enjoy a right of way over his neighbor's ground, because he and his ancestors had exercised the privilege time out of mind, and the property in the easement would be as absolute as though it were based upon written instruments. The statutes of all, or nearly all, the American States have shortened the length of time necessary to establish a prescription, and have reduced it to a definite number of years, in most instances to twenty. They also provide that the uninterrupted possession of land for the required period, by a person claiming to be owner, shall result in the acquisition of a complete right of property by the occupant. Certain other statutes, techni-

cally known as the statutes of limitations, operate in the same manner to confer personal rights, and even property in chattels and things in action, after a continued enjoyment for a shorter period.

§ 790. This mode of acquisition is an illustration of the care which the law takes to prevent controversies respecting ownership, and to preserve the quiet and peace of society. It is the result of presumptions inferred from numerous cases, and is made general and invariable by positive legislation. It is deemed better for society that occasional injustice should be suffered by those who have neglected their rights, than that long-continued quiet possession should be disturbed, when it would generally be impossible to explain all the circumstances and elicit all the truth.

§ 791. 3. *Natural Increase.*—This method of acquiring property is plainly in accordance with natural justice. Whatever one's own land and movables may produce, the fruits of the soil, the increase of animals, and the like, belong to him. This principle is so evident that it needs no illustration. The Roman law and the European jurisprudence based upon it, unite this mode of acquisition with the one next succeeding, and call them accession.

§ 792. 4. *One's own Labor.*—Whatever things a person produces or constructs from his own materials by means of his labor are clearly his. But the principle is extended further, so as, in some instances, to include the materials of another. Thus if a person furnishing the principal materials, should by his labor unite with them those of another in the manufacture of an article, the whole product would belong to the manufacturer. This doctrine was greatly elaborated and refined by the Roman jurists, and is recognized by our own law. The rule would seem to be that the property in the accessories should accompany that in the main thing. Our law, however, does not suffer one person to gain property in another's things by means of his labor, when they were originally taken by fraud or wilful

trespass. Whatever alteration of form such article may have undergone, the original owner may reclaim it in its new shape, if he can establish the identity of the materials. It must not be understood that in this appropriation of another's things, which is occasionally permitted, the owner is left without any remedy against the manufacturer. He loses indeed his right of property, his power to take the specific article, but he may still demand and recover its value.

§ 793. It would seem that the products of mental exertion should possess the same legal characteristics as those of manual labor, and should be invested with the attribute of property in the author. But this is not so. The common law does not confer upon inventors or authors any right of ownership over their productions. We must understand what is intended by property in an invention, a writing, or other result of thought. It is not mere ownership over the materials of which a new machine is composed, or over a manuscript, or a printed book. Over these the common law gives a perfect dominion, with full power of use and disposition. Property in the product of intellectual labor is something more intangible than this. Its existence assumes a difference between the results of thought, and the material objects in which those results are incorporated and made accessible. Now while the common law of England admitted a complete right of ownership in these latter material objects, it denied any exclusive proprietorship in the more valuable results themselves of mental effort, separate from the tangible medium in which they were embodied. Thus after an author had written and published a book, all other persons had a right to appropriate his labors and copy and publish the same work. After an inventor had perfected his improvement, all other persons could adopt the same methods, and construct, use, or sell the same machine.

But the manifest injustice of this rule of the ancient law was long ago corrected in England and America by statutes,

which give to prior inventors an exclusive right to make, use, or sell their inventions when patented, and to authors the same authority to publish and vend the works of which they have secured the copyright. The methods of securing patents and copyrights are entirely regulated by these statutes, but it is not necessary to describe them here.

## II.

### WHEN PROPERTY IS ACQUIRED ON THE OCCASION OF THE DEATH OF THE FORMER OWNER.

§ 794. At the death of an owner of things real or personal, his rights of property must pass to some other persons. This transfer may be effected in either of two methods. He may himself control it by will, and designate the individuals who shall succeed to the estate, and what rights they shall acquire in it; or in the absence of a will, the law points out the persons to whom, and the modes by which, the ownership shall descend. There are then two cases to be separately considered under this division: 1st, when the owner dies intestate; and 2d, when he leaves a last will and testament.

§ 795. 1. *In case of Intestacy.*—The municipal law of England and of the American States most plainly exhibits the distinction between things real and things personal, in the very different rules which it provides for their disposition on the death of an owner intestate. The origin of these methods has been explained in the chapter upon the feudal system. The descent of lands to the heirs is regulated by principles derived from the feudal polity. The succession to movables is governed rather by rules borrowed from the Roman law. Following this line of separation, which the law itself draws, I shall speak 1st, of acquiring property in things personal in the case of intestacy; and 2d, of the descent of things real to the heirs of an intestate owner.

§ 796. (1.) *Of acquiring property in things personal, in the case of intestacy.*—Property in the movables of an in-

testate does not pass at once to those who will be the ultimate owners, but rests primarily in a trustee, called an administrator, who is charged with the duty of settling the affairs of the deceased, paying his debts, and distributing the remaining surplus to those persons who are entitled by law to receive it. This whole process is the creature of statutes in England and America. Very anciently the English king seems to have succeeded to the personal estates of those who died intestate within the realm; subsequently the bishops, in virtue of their ecclesiastical power, assumed control over them, and were nominally bound to settle and distribute them. At length, in the reigns of Edward III. and Henry VIII., statutes were passed which adopted methods substantially the same as those existing in England and America to this day. The bishops, instead of attending themselves to the management of the personal estates of the dead, were directed to make appointment of administrators to discharge this duty.

§ 797. In England the trustees are still named by the ecclesiastical courts; in the United States the power of appointment is committed to the Surrogate, Probate Courts, or other special tribunals which have cognizance of such matters. By the English law the administrator must be generally selected from certain special classes of persons, including the kindred and creditors of the deceased. The statutes above referred to provide that on the death of the wife, the appointment is given to the husband; on the death of the husband, to the widow or to the next of kin; on the death of an unmarried person, to the next of kin. Among the next of kin, those in the nearest degree are preferred before those more distantly related, and these degrees are reckoned according to the Roman law as explained in a former chapter, children and parents being in the first degree, brothers and sisters, grandparents and grandchildren being in the second, and the third including, among others, uncles and aunts, nephews and nieces. Among the relatives in the same degree

the choice is unrestricted, except that children are taken before parents. The order of selection after the widow, would then be as follows: children, parents, brothers or sisters, grandparents, uncles or aunts, nephews or nieces, cousins. When there are no kindred, or none that will accept the trust, recourse is had to a creditor of the deceased, and in the absence of creditors, to any other competent person. While the several States have substantially adopted this English system, they have all doubtless made some modifications in the order of the classes entitled to the appointment. In New York administration must be granted to the widow and next of kin, or to some one of them, if they will accept, in the following order: 1st, to the widow; 2d, children; 3d, father; 4th, brothers; 5th, sisters; 6th, grandchildren; 7th, any other of the next of kin who would be entitled to a share in the estate. If none of these relatives will assume the trust, it must be given to the creditor first applying, and finally to any other person legally competent to act. Among several of the same degree, males are preferred to females, and the court has power to choose from those equally entitled to act.

§ 798. The administrator thus appointed becomes immediately vested with the ownership of the personal effects of the deceased, not absolutely indeed, but as a trustee acting under the direction of the court which appointed him; and is charged with the duty of paying debts, and distributing the surplus to the relatives entitled by law to receive it. Yet for the time being he holds the legal title of the personal estate, and is the immediate source of ownership to the creditors and next of kin among whom it is divided. He is responsible for the debts of the deceased, to the amount of effects which come into his hands, and no more; and in this and some other particulars resembles the heir in the later Roman law who took an estate with the benefit of an inventory. He has, as administrator, no power or control over the lands of the intestate, but in some, and

probably all, of the States, may apply to the court for direction to sell or mortgage some portion of them, in order to raise money to pay debts, when the personal estate is insufficient for that purpose.

§ 799. The principal duties of an administrator are the settlement of the affairs of the deceased, the payment of his debts, and the distribution of the surplus among the next of kin. In the performance of these duties he has authority to collect all claims, and convert the effects into money, and is bound to use diligence, and is liable for all neglect of his trust and abuse of his powers. Acting as a trustee, he is held to a rigid accountability to the court which appointed him, and of which he is to a certain extent an executive officer. In the payment of debts, the English rule obliges him to give preference to certain classes of creditors. In some of the States this rule remains; in others it is abolished, and after satisfying all dues to the general and local governments, and judgments which are a lien on the estate, he must regard all other debts as on the same footing, and pay them ratably, if the funds are insufficient to discharge them all in full.

§ 800. When the debts are paid, the administrator must render an account of his trust to the court which appointed him, and under its direction and by its decree, a distribution of the surplusage is made. The persons who share in this division of the personal estate are determined by statutes in England and the American States, the provisions of which are substantially borrowed from the legislation of Justinian. In England the widow receives one third part of the residue after the payment of debts, and the remainder is divided in equal portions among the living children, and the descendants of those who are dead. If there be no children or their descendants, one half part is appropriated to the widow, and one half to the nearest of kin who are related in an equal degree to the intestate, or to their descendants if any be dead, with some limitations. If there

be no widow, the estate is distributed equally among the children, and if no child, then among the next of kin in equal degrees, and their descendants. In reckoning the degrees of relationship the rules of the Roman law are followed. In the case of living children and descendants of a dead child, the latter take together only the share which would have belonged to their parent were he still surviving; and the same is true whenever the distribution is made to a number of individuals in the same degree of relationship, and to the children of others who are dead. If the intestate left two children, and descendants of another, or two brothers, and sons and daughters of a third, the whole estate would be divided into three equal parts, one for each of the relatives in the same degree, and one for those who represent the dead child or brother. Persons in such situation are said to take *per stirpem* and not *per capita*, as was explained in the chapter upon the Roman law. The regulations of this English statute of distributions have been closely copied in the legislation of the American States, with minor modifications in the order of the persons, and the shares which they are entitled to receive. In New York, the widow succeeds to the whole personal estate if there be no descendant, parent, brother or sister of the decedent; if there be no descendant or parent, but other next of kin, she takes the whole if it do not exceed two thousand dollars. Probably a similar or even stronger discrimination is made in favor of the widow in many other States.

It is thus seen, that, in case of an intestate, a qualified property in his things personal first passes to an administrator, and through him an absolute property is acquired by creditors, and by such relatives as are designated by statute.

§ 801. (2.) *Of acquiring property in things real in case of intestacy.*—By the law of England and that of nearly all the American States, property in the things real of an intestate, passes immediately on his death, without the inter-

vention of any administrator, to certain specified classes of persons who are related in blood to the deceased. This transfer of the estate is called descent; the method of acquisition is called inheriting; and the individuals who succeed to the rights of ownership are termed heirs of the last proprietor. The almost exclusive object of the rules embraced in this branch of the law, is to designate what persons are the heirs of an intestate under various circumstances, and therefore entitled to receive and acquire property in his lands. In explaining this subject, I shall first give a brief summary of the law of England, and secondly notice some of the modifications introduced by American legislation.

§ 802. The rules of descent and heirship incorporated into the English common law, were all borrowed, or inferred by strictly logical reasoning, from the military ideas and institutions of the feudal system. It will be remembered that during the existence of this polity, grants of land called benefices, feuds, or fiefs, were made by a lord to his vassals, to be held by them in consideration of certain military services rendered from time to time to the superior. It was of the highest importance to this lord, that the fiefs originally granted by him should always remain in the possession and ownership of vassals able to respond to his demands for military aid. To secure this object it was necessary that individual fiefs should remain entire, and not be divided and distributed among many petty owners, and that the vassals should, if possible, be males capable of bearing arms. Hence, on a vassal's death, the exigencies of the feudal policy required that his fief should descend to his male children rather than to his daughters, and that among the sons one alone should succeed to the inheritance. From these considerations sprang the English doctrine of preferring males to females, and of the rights of primogeniture among the males.

§ 803. Furthermore, according to the feudal ideas, the

heir who succeeded to a fief on the death of the last owner, was not considered as the representative of that owner, and as drawing the right of property from him, but as the representative of the vassal to whom the land had been first granted, and as acquiring a right of inheritance by means of a consanguinity with him. In theory, a reference was constantly made to this original vassal as the stock of descent, and the heir who would enter upon the enjoyment of property, must stand in his place and succeed to all of his rights, while all of the intermediate possessors were looked upon only as channels through which the relationship could be traced up to this head. This feature of the feudal law of inheritance has been already explained at large in the chapter upon the feudal system, to which I would refer the reader. When feudalism was outgrown, and its ideas were transferred into the judicial legislation of England, this principle was adopted into the law of descents. The rule then requires that the heir shall be of the blood of the person who originally acquired the estate, and therein makes a difference between lands which had been inherited by an intestate, and those which had been purchased by him. Every purchaser becomes himself a new stock of descent, and is analogous to the original holder of a fief; while in the case of the descent of inherited lands, recourse must be had to the person who first acquired them by purchase, in order to trace down his blood, and find the heirs.

§ 804. But as it would generally be impossible to trace back this connection between the heir and the individual who was the primitive stock of descent, the law adopted the convenient rule that the blood relatives of the last owner of lands who held not only a right of ownership over them, but their possession also, either actual or by lessees or tenants, should be conclusively presumed to be also blood relatives of the original purchaser to whom a consanguinity must be traced. This union of the right of ownership in lands with the possession immediate or mediate, the English law

terms *seizin*, and the person who united these elements in himself, was said to be seized of the estate. This rule, that the blood relations of the deceased owner last seized, should be presumed to be the blood relations of the original purchaser, preserved the form of the old feudal principle, and at the same time overcame the difficulty of its application in multitudes of instances when family traditions had been obscured by numerous generations of descent. But the logic of this doctrine was pushed further, for the rule not only admitted those as heirs who could connect themselves in blood with the owner last seized, but excluded all who could not. Thus upon the death of an individual who had a right of ownership in lands, without the enjoyment of that possession of them which constitutes a *seizin*, the estate does not descend immediately to his blood relations, but the heirs are found among the relatives of the last owner who was seized.

§ 805. Having thus briefly stated some of the reasons and institutional causes of the apparently technical, unjust, and arbitrary provisions of the English law regulating descents, inheritances, and heirships, I will add a synopsis of the rules themselves which are termed Canons of Inheritance. 1. Property in things real shall be inherited by the children, grandchildren, and other lineal descendants of the person who last died actually seized, so long as this descending line continues, but shall never ascend to parents or other lineal ancestors. 2. The inheritance descends to male in preference to female children, but in the absence of sons or of descendants from them, the daughters are admitted. 3. Of several males in the same degree, the eldest one is the heir, and takes the whole estate; but females in the same condition all inherit in equal shares. This preference of the eldest male is known as the right of primogeniture. 4. Among lineal descendants, children stand in the same place as their ancestor would have done were he living, succeeding to his share, and are thus said to represent him,

and to inherit *per stirpem.* By this rule the descendants of an eldest son inherit before the younger son. To illustrate; if, upon his death, the intestate should leave but one son, or one daughter, that person would succeed to the entire estate; if he left daughters alone, they would all take together in equal shares; if he left sons and daughters, the eldest son would acquire the property in the whole inheritance, which would continue in his line of descendants until that became extinct, and would then pass over to the second son, and his line of descendants, and so on through all the sons, until there was a complete failure of the male stocks, when it would be transferred to the daughters or their issue. 5. On the failure of lineal descendants of the person last seized, the inheritance descends to his nearest collateral kin being of the blood of the first purchaser, from among whom the heir is designated by applying the foregoing rules, that among those of the same degree males are preferred to females, that the right of primogeniture exists among males, that females take together, and that lineal descendants represent an ancestor, and stand in his place and enjoy his rights. The degrees of consanguinity are reckoned according to the Canon law, which commences with the common ancestor of the two collateral relatives, and counts down the longest line. Thus upon the death of an individual leaving no issue, but having brothers and sisters, the eldest of these brothers, as being in the nearest collateral degree, would be the heir; and if he also were dead, the property would pass to his children before the second brother could claim it. In short, the choice of heir among collaterals is made according to the same rules as that among lineal descendants. Following brothers and sisters and their descendants, the next collateral degree includes uncles and aunts. 6. The last rule is that collaterals related to the intestate through his father are preferred as long as they are in existence, before those on the female side, unless the estate came to the deceased through his mother. In the lat-

ter case the heirs are found alone among collaterals on her side.

These principles of the English common law may be summed up as follows: preference of males to females; primogeniture among males; the estate never lineally to ascend; representation of ancestors and inheritance *per stirpem;* collateral heirs to be of the same blood as the first purchaser, who is considered as the stock of descent; and the preference of kindred derived from the blood of male ancestors, however remote, to that derived from female ancestors, however near. It will be seen that, unless an estate is inherited by several female heirs who take equal shares, it cannot be subdivided, but must descend entire to a single heir. This rule of the law has the effect to preserve land in the same families, and to restrict its diffusion, to an extent unknown and impossible in this country.

§ 806. These various canons of inheritance, descent, and heirship, have been greatly changed by the statutes of the American States. In fact, many of the principles upon which they are based have been abandoned, and the doctrines of the Roman law have been more nearly followed. There is a general likeness in the legislation of all the States. The rule requiring recourse, actually or theoretically, to the first purchaser as the stock of descent, has been abrogated, and the deceased owner, whether seized or not, is considered as the source of inheritance, with whose blood alone the heirs need be connected. Females are admitted equally with males of the same degree to share the estate. Primogeniture is abolished. In most of the States the inheritance may ascend to parents. Based upon these principles, the following canons of descent are common to all or to most of the States.

§ 807. 1. On the death of an owner intestate, the property in his things real passes to his lawful lineal descendants male and female, who, if in the same degree of consanguinity, take equal shares, and thus the whole property is imme-

diately divided into as many separate ownerships as there are heirs. Posthumous children inherit equally with those born before the death of their ancestor. Thus if the heirs are all children, or all grandchildren, or all great-grandchildren, they receive equal shares, and so inherit *per capita*. 2. If however the heirs are descendants in different degrees of consanguinity, the English doctrine of representation among them prevails, and they inherit *per stirpem*. Thus if children be left, and sons and daughters of a dead child, the latter take collectively only the share which would have belonged to their father. 3. In many of the States, upon the death of an intestate without lawful descendants, the property in his lands passes to his parents, if living, either jointly, or to the father first, or, if he be dead, to the mother. In some of the States, descent in the ancestral line stops with the parents; in others it is continued to grandparents. 4. In the absence of descendants and parents, recourse is had to the nearest collateral relatives, and the inheritance passes to the living brothers and sisters of the intestate and the descendants of those who are dead, among whom it is divided in accordance with the same rules which apply to lineal heirs. 5. When all these classes fail, the law of some States prefers grandparents; while that of others declares uncles and aunts and their descendants to constitute the next degree who are to receive the estate. If the land came to the intestate by inheritance on the part of his father, his paternal uncles and aunts would succeed to it; but if it descended to him from the mother, her collaterals would be preferred. 6. In the absence of all these classes, the remaining next of kin according to the statute of distributions of personal effects, would be the heirs; or else the inheritance would follow the rules of the English common law.

§ 808. This sketch is sufficient to show the general features of the law of descent and heirship as it prevails in the United States. While we have retained so much of the feudal system as creates a marked distinction between lands and

movables, and establishes different modes for acquiring property in them at the death of an intestate owner, yet we have abolished those technical rules which, inferred as logical consequences from feudalism, have rendered the English law harsh and inequitable. The policy of our institutions is to preserve lands in commerce, with a perfect freedom of acquisition and transfer; and to prevent their accumulation in families. This has been effected by admitting all relations in the same degree to inherit equal shares of an estate.

§ 809. At an early period of the English law, lands descended to the heir free from the debts of the intestate, as has been explained in a preceding chapter; but this unjust provision was afterwards relaxed. It has no existence in the United States, but the vestige of the old doctrine still remains. The personal effects of an intestate yet constitute the primary fund out of which all his debts must be paid if possible, so that the lands shall be unencumbered; but if this fund be insufficient, after its exhaustion recourse is had to the real estate in the hands of the heirs, who are then liable to the amount which descended to them.

§ 810. These general canons of descent in the American law may be summed up as follows: the preference of the lineal descendants in the heirship; the admission of the ascending line as far as parents, and in some States, grandparents; inheritance of collaterals in the order of brothers and sisters and their descendants, uncles and aunts and their descendants; the admission of all heirs in the same degree to an equal share; representation among those in different degrees; equality between male and female heirs; and preference of collaterals on the male side when an estate came from the father, and on the female side when it descended on the part of the mother.

§ 811. 2. *By Last Will and Testament.*—A will is a disposition of property in things real and personal, to take effect at the death of the testator. The law gives the owner

of things a capacity to direct into whose hands they shall pass after his decease, and this power is exercised by a last will and testament. Such a control seems to be an incident of the mere fact of proprietorship, and we therefore find this method of transferring and acquiring property common in all countries and in different degrees of civilization. Wills of lands, however, were opposed to the feudal ideas, and during the prevalence of that policy in England they were not allowed, until the reign of Henry VIII., when they were permitted by statute. Wills of movables came into use gradually, and were established without the sanction of parliamentary legislation. Wills are common throughout the United States, and the rules respecting them are partly based upon statutory enactments, and partly upon decisions of courts.

§ 812. It is a settled principle of law in all the American States except Louisiana, that the property in all the things of a testator, whether real or personal, may be disposed of by will. Neither in England, nor in America, with the exception just mentioned, is an owner compelled to reserve anything for his children or other heirs. The entire estate may be transferred, or any part of it; it may all be given to one individual, or be divided among many. The testator may make any dispositions, transfer any estates, and impose any limitations that he may wish, provided they are in accordance with the general rules and principles of the law. He is permitted to exercise as complete a dominion over his possessions as is compatible with the interests and policy of the commonwealth. A gift of land by a will is technically termed a devise, and the person receiving it, a devisee; a gift of movables is called a legacy, and the individual to whom it is made, a legatee. By the common law, only such lands as the testator owned at the time the will was executed, were subjected to its operation; all acquired subsequently descended to the heirs. This rule has been changed in the United States, and, if sufficiently com-

prehensive in its terms, the instrument covers all the estate owned by the testator at the time of his death.

§ 813. The English law clothes all persons of sound mind, except married women and infants, with the capacity to make wills of lands, and extends the right to make wills of movables even to infants of fourteen years if males, and twelve years if females. In most of the United States these latter ages are probably increased to eighteen, and sixteen years. Recent legislation in this country has very generally removed the disability from married women, and permitted them to dispose of their estates as though they were single. The rule then in all those States which have reconstructed the law of husband and wife, would seem to be, that all persons of sound mind, whether single or married, can make a valid will, with the exception of infants under the restrictions above stated. All persons whatever, whether infants, married, or even insane, may acquire property by this method. There is then no restraint upon the property which may be conveyed, nor upon the persons who may receive, and only a slight one upon those who may transfer by will.

§ 814. In England there is a distinction between wills of land and those of chattels. The former are required by statute to be in writing, signed by the testator, and attested and subscribed by two witnesses in his presence. The latter class were anciently oral, and even after those in writing became universal, they needed no special formality in their execution. By the statutes of most of the American States, both classes are placed upon the same footing, and must be carefully executed with the same formalities. The detail of these forms requisite to the validity of wills, varies much in different States. In general these instruments must be in writing, signed by the testator, or his signature acknowledged, in the presence of two or three witnesses, who also add their names in attestation. The law of some States, however, is much more particular and minute, rendering the

execution of a will a complex operation. In New York, the testator must sign at the end, in the presence of two witnesses, or acknowledge his signature to them, and at the same time declare the instrument to be his last will and testament, and at his request the witnesses must also subscribe their names. As these regulations are made by statute, their observance is necessary to the validity of the will and in proving the instrument after the death of the testator, it must be affirmatively shown that they have all been substantially complied with. The intention of the legislature was to remove all opportunity for setting up forged wills, and all doubt as to the testator's acts and intention. Still this very strictness and multiplicity of detail have sometimes the effect to thwart the evident wishes of the deceased, when any omission has been ignorantly or carelessly made.

§ 815. A will is entirely inoperative during the interval between its execution and the testator's death, and may be altered, or revoked, or annulled by him at pleasure. The alteration is done by a codicil, which is a supplement annexed to the original instrument, making additions to or changes in its provisions. The intention to revoke and annul a will must be exhibited in some unmistakable manner, either by burning, cancelling, tearing, or obliterating it, or by executing another, inconsistent in its terms with the former one. Certain other acts of the testator, not directly connected with the will, are also deemed to indicate in a positive manner his intention that it should be revoked. Thus his subsequent marriage and the birth of children have this effect. So also the will of a single woman is rendered null by her marriage. It may be doubted whether this last rule would still remain in New York and other States in which a wife is declared by law to lose none of the rights over property which she enjoyed while single. The sale, during the testator's lifetime, of lands devised or chattels bequeathed by him, withdraws them from the operation of his will.

§ 816. Upon the death of the testator, property in the lands given by him immediately rests in the devisees, unless otherwise directed. This is not true of chattels. The will must be proved, and a trustee, analogous to an administrator, appointed to settle the estate, pay the debts, and distribute the legacies. This person is called an executor, and is usually named in the will itself; if not, the Probate Court or Surrogate supplies the omission in the same manner as it designates an administrator in case of intestacy. An executor must first submit the will to the court for proof, and its authenticity and proper execution having been established, he proceeds according to its directions to settle the estate. He is the agent of the deceased for the purpose of carrying out his expressed wishes. In the absence of any express provisions, he must pay the debts from the personal effects as a fund; but may be directed by the will to convert the real estate into money for that purpose. When all the debts are discharged, he must proceed to pay the legacies, in full if posible, and rateably, if the fund be insufficient. Legacies are either specific or general; specific, when they are gifts of some particular articles; general, when they are gifts of certain amounts or portions of the estate, undivided from the residue of the effects. As the testator's intention is more marked in reference to the former class, they are to be first paid, so that any deduction which may be necessary, shall fall, if possible, on the general legacies alone.

§ 817. No technical words are necessary to convey an absolute property in either lands or movables; but in giving effect to the provisions of a will the intention of the testator is to be carefully ascertained and implicitly followed. The law has laid down some special rules to aid in discovering this intention when the meaning is doubtful, but to explain them would lead me into too much detail.

## III.

### WHEN PROPERTY IS ACQUIRED FROM A FORMER LIVING OWNER.

§ 818. The methods by which property in things real or personal may be acquired from a former living owner, are naturally distributed into two general divisions; 1st when the transfer is made by his act and with his consent and 2d, when it is made as a consequence of his acts, but without his consent. In the former class are included donations and contracts, which apply only to movables; conveyances by deed, which apply only to lands; and marriage, which applies to both. The latter embraces forfeiture, judgment and execution, and insolvency or bankruptcy. These will be briefly noticed in order.

§ 819. 1. WHEN THE TRANSFER IS MADE BY THE ACT, AND WITH THE CONSENT OF THE FORMER OWNER.—In all the methods embraced in this division, the owner who parts with property is an efficient actor in directly causing the transfer from himself to another. Whether he donates, sells, hires, loans, conveys land by deed, or marries, he contemplates a change of property in his things, as the very result to be accomplished. In this purpose he must be aided by the receiver, who either passively accepts, or entirely procures the change of ownership, by a similar transfer of property in other things, or by rendering some benefit, as a consideration.

§ 820. (1.) *Donations.*—A donation or gift is a voluntary transfer of property in a movable, without any consideration or benefit passing from the receiver to the donor. Chattels alone are the objects of this mode of acquisition, for lands can only be conveyed by a formal written instrument. The element which distinguishes gifts from sales and other contracts, is the absence of any consideration. As it might easily be made the cover of fraud and imposition, the

law does not favor this method of acquisition, and guards it with strict rules. An actual delivery of the article, so that the former owner shall completely abandon his dominion over it, is absolutely essential to any valid gift. Promises to give, even in writing, without this indispensable accompaniment of delivery, have no binding force. Donations are of two kinds; those *inter vivos*, and those *causa mortis*. The former may be made at any time, and take effect immediately. When perfected they are irrevocable, unless they are prejudicial to creditors, and even then they cannot be assailed by the donor. Donations *causa mortis* are made in apprehension of death, and are conditional until the death occurs, when they become absolute. They have, then, a strong resemblance to legacies given by will. Even after a delivery of the thing to the intended beneficiary, if the giver recover, the donation does not take place, and no property is transferred. So guarded is the law in respect to this latter species of gifts, that it requires a delivery of the very article, goods or money, into the possession of the recipient, and is not satisfied with a transfer of the means of procuring the article. So it is a settled rule that a gift of a written order for money in the keeping of a third person would not operate to transfer the property in the money. The same principle has been applied in many analogous cases.

§ 821. (2.) *Contract.*—Property in movables may be voluntarily transferred from one person to another by contract. In its most general sense "a contract is an agreement upon a sufficient consideration, to do or not to do a particular thing." The various kinds of contracts may be completely expressed by the four following formulas, viz.: *do ut des; do ut facias; facio ut des;* and *facio ut facias.* By the first three of these classes property in chattels of any description may be acquired. The first (do ut des) implies that one party gives something to the other in consideration for a thing returned or to be returned. In it are included all sales of chattels, whereby property in the article

is transferred to the buyer, and in the price, to the seller; all barters, whereby property in goods is mutually interchanged; all loans, whereby property in the thing loaned passes to the borrower, upon the credit reposed in him that he will return an equivalent. The second and third classes (do ut facias, facio ut des,) imply that some acts are performed by one party, in consideration of something given by the other. In these divisions are included all contracts of hiring, and all others in which services are rendered as an equivalent for things transferred. The hirer or employer has a right to the stipulated labor, care, and other service, or to the use of the article agreed upon, and the employee acquires property in the price, whether it be money or other movable.

§ 822. These comprehensive divisions include all the cases in which property may be transferred and acquired by contract, but any more detailed account of the methods of sale, barter, loan, hiring, and others, is postponed to the succeeding chapter, which will be devoted to the subject of contracts. It must not be understood that a transfer of property may be effected by every species of contract, for these agreements are as varied in their terms and stipulations as the necessities of mankind require, and often relate entirely to other subjects than the right of ownership in things. The fourth class (facio ut facias), in which one party engages to perform services, in consideration for services rendered by the other, includes such cases.

§ 823. (3.) *Conveyance of Land by Deed.*—A voluntary transfer of property in lands is effected, in England and the United States, by a written instrument called a deed. In very ancient times, conveyances could be made without a writing, certain public formalities in delivering possession serving to mark the act and indicate the intention of the owner in parting with his rights. But, as we have seen, written conveyances, then and for a long time after called charters, were not uncommon among the Saxons, and these

grew into more general use, until they became universal, and were fully recognized by the common law. Finally the statute of frauds added its requirements to the provisions of the former unwritten law. This statute, which, as I have already remarked, has been adopted in all, or nearly all, of the American States, requires that transfers of any interests in lands, except those held by leases for a short period, shall be in writing.

§ 824. As in the case of wills, so in that of deeds, an owner may transfer any rights, create any estates, impose any limitations, that are not contrary to the general principles and rules of the law. The law of England and of our own States, influenced by a consideration of public policy, has forbidden certain dispositions of property to be made. In this country the restraints upon the unlimited power of owners are much greater than in England. Our whole policy, and the condition of society with us, require that lands should be kept in commerce, free to be bought and sold; and our law does not therefore permit owners to tie up their estates, so as necessarily to retain them in families, and prevent them from being freely aliened. Beyond this class of restrictions, which will be more particularly referred to in the succeeding section, the law does not interfere with the wishes of owners in conveying their lands. The contents of a deed therefore, that which determines to whom and for what purposes the land is conveyed, what interests in it are transferred, and for what time these are to be enjoyed, must rest in a great measure upon the agreements of the parties, or the wishes of the owner.

§ 825. As a general rule, all owners, except infants and persons of unsound mind, are able to convey by deed. In most of the States the consent of the husband is necessary to the validity of a married woman's conveyance. The essentials of a deed are, that it must be written, signed, sealed, and delivered. The writing is required by the common law and by statute, the sealing by the common law. In ancient

times, when writing was a rare accomplishment, it was the custom for persons to execute these instruments by stamping their signets in wax upon the paper or parchment. This once reasonable practice was adopted by the common law, and was required as a form to give character and efficacy to this species of writings. In some States the seal is still retained unaltered, as an impression upon wax, wafer, or other tenacious substance; in other States the mere shadow of this form is sufficient, and the seal has degenerated into a simple scroll with a pen. A delivery of the deed to the party purchasing, or his agent, is necessary to perfect the conveyance, for as long as it remains in the possession of the vendor, he may rescind his agreement; but when the possession is once fairly transferred to the purchaser, the property is thereby also transferred and vests in him. This delivery of the deed is equivalent to the ancient delivery of the land. So effectual is this act, that when the title has been once vested by this means, it cannot be abandoned, or revested in the original owner, even by destroying the instrument; nothing but a formal reconveyance will suffice.

§ 826. The legislation of all the States provides for proof of deeds by an acknowledgment of their execution made by the party before some officer designated by statute. A married woman must generally make this acknowledgment separate and apart from the husband, in order that a conveyance of her right of dower shall have any validity. Provision is also made for recording deeds so acknowledged, in public offices of registry. This practice of recording is universal in the United States, and is of the utmost convenience in furnishing accurate information as to the ownership of lands. The record of a deed is not in general essential to its validity between the immediate parties and their heirs, but is intended as a notice to all the world of the transfer of property, and the present ownership. The statutes therefore declare that the fact of recording shall raise an absolute presumption of law that all persons are informed of the contents of the instruments so

registered, and shall have the same effect as an actual notice. These statutes further provide that subsequent *bona fide* purchasers of land by a deed which has been recorded, shall have priority over a former unregistered deed of the same premises from the same owner, of which they had no actual notice. In other words successive deeds, other things being equal, take a priority, not according to the dates of their execution, but of their recording. The policy of this legislation is evident. By making it possible for all purchasers to give immediate notice of their newly acquired rights, and for all persons about to purchase, to satisfy themselves of any prior claims to the same lands, it has removed all opportunity for mistake, deception, or imposition. With a moderate degree of care and diligence, all danger of loss can be effectually guarded against. These statutory provisions apply not only to absolute conveyances, but to all deeds which create a lien or encumbrance on lands, such as mortgages, and to those which transfer partial interests, such as leases.

§ 827. The contents of a deed will of course vary with the purposes for which it is executed. The instrument must contain the names of the parties, or such reference to them that they can be identified. A consideration is also generally necessary, although a gift of land by deed is obligatory between the parties, and can only be questioned by creditors and subsequent purchasers whose rights are concerned. The premises conveyed must also be described with so much certainty that they may be clearly ascertained. No formal or technical expressions are required to effect the transfer of an absolute property in lands, and in this country deeds are usually simple and short, divested of the verbiage and redundancy which is common in England. By the common law, and perhaps still by the law of some of the States, the words "and his heirs," after the name of the purchaser, must be inserted, when it is intended to convey an absolute estate in fee; in the absence of these words, only an interest

for life will pass; but this rule has been altered by statute in many and probably in most of the States.

§ 828. These instruments often contain covenants or agreements on the part of the person who conveys, that he is the lawful owner of the premises, or that he has the right to convey, or that the land is free from encumbrance, or that the purchaser shall quietly enjoy its possession, or that he will warrant and defend the title against all lawful claims. The object of these special agreements is, that the purchaser may have recourse against the seller for damages, in case a perfect, free, unencumbered right of property has not been transferred to him. Thus if the deed contained the above covenant of warranty, and the land should be taken from the purchaser by some third person who had a lawful claim to it, which would necessarily involve the fact that the seller had no property therein which he could transfer, the purchaser could recover from the other party such damages as he had sustained, which would be at least the amount of the purchase money and interest. When none of these special agreements are embraced in the deed, according to the legislation of some States, the person who gave the instrument would not be liable in any event; but by the English law, and that of other States, the use of certain words of conveyance is equivalent to the insertion of some of these covenants, and imposes the same liability upon the seller.

§ 829. (4.) *Marriage.*—By marriage the husband acquires rights of property in the lands and movables of the wife, and the wife acquires a life interest in the lands of her husband. This transfer is the result of the mutual acts of the parties. It is certainly an error to describe this or any other mode of acquisition as specially effected by the law. All transfers are the results of legal rules based upon certain circumstances or acts of the persons concerned. It is the law which gives effect to conveyances of land, sales of chattels, as well as to the change of rights which follows a

marriage. In all these instances the parties voluntarily place themselves and their possessions in a situation where the law acts upon them and carries out their intentions. Of the special transfers of property which result from marriage, I have already spoken in the preceding chapter.

§ 830. 2. WHEN THE TRANSFER IS MADE AS A CONSEQUENCE OF THE FORMER OWNER'S ACTS, BUT WITHOUT HIS CONSENT.—The methods included in this class are all based upon the acts of the former owner, and thence draw their efficacy; yet the results are not contemplated by him, and therefore want the element of his volition which characterizes those of the former class. The particular acts which have this power of being the occasion of a transfer of property, are the commission of certain crimes, and the contracting of debts.

§ 831. (1.) *Forfeiture.*—Forfeiture is a consequence of certain crimes, on the conviction of which the criminal loses his rights of property, which thereupon pass to the State. The common law annexed this penalty to many offences, but these ancient rules have been abolished in this country, and the whole subject has been regulated by the national and State constitutions and statutes. The Constitution of the United States declares that treason shall not work a forfeiture, except for the life of the offender; and most of the States have restricted this method of acquisition in the same manner, while some have discarded it altogether. It may be considered as a rule throughout the United States that forfeiture does not exist except in the case of treason, and even then, under the limitations above mentioned. There is also a species of forfeiture between private owners known to the common law, but it probably is not recognized in any of the American States.

§ 832. (2.) *Judgment and Execution.*—Upon the recovery of a judgment which directs the payment of money, the common law and statutes in England and the United States

give the creditor the power to satisfy his claim out of the debtor's effects. Anciently only chattels were subject to be taken for this purpose, but Parliament gradually extended the remedy to lands. In this country the whole subject is regulated by statute, and there is much diversity in the details of the legislation of the different States, but the general principles are common to all.

§ 833. A judgment must be satisfied if possible from the personal effects of the debtor. For this purpose an execution is issued and given to the proper officer, generally the sheriff, who is thereby directed to levy upon or seize the goods of the judgment debtor, and sell them, and from the proceeds satisfy the claim. From the time the execution is delivered to the sheriff, it is a lien upon the chattels of the defendant, so that they can be taken, although possession may have been transferred to other persons. All descriptions of things personal, however, are not subject to this compulsory sale, but only those tangible, material articles which are technically known as chattels. Things in action belonging to a debtor are beyond the reach of an execution. Of course, by this proceeding, the property in the movables seized and sold is transferred from the original owner to the purchaser from the sheriff.

§ 834. A judgment having been rendered by a competent court, it is then docketed, or in other words, is inscribed or registered in a public office, in a manner analogous to the recording of deeds, and notice of its existence is thus given to all the world. In some States, the judgment is a lien, or encumbrance, upon the lands of the debtor from the time it is thus publicly docketed. This lien, as long as it continues, preserves the right of the creditor to seize and sell the lands, although they may have been subsequently transferred to other persons. The lien, however, expires after a prescribed number of years. Successive judgments against the same person take precedence in the order of their docketing. In other States this lien does not

arise from the mere docketing of a judgment, but from the issuing of an execution to enforce it.

§ 835. In the absence of sufficient chattels to satisfy a judgment, the lands of the debtor may be sold for that purpose. I shall not attempt to describe the various statutory provisions of the different States, which regulate the sale of lands by execution. In some, the lands are sold at auction by the sheriff to the highest bidder under such restrictions and regulations as prevent a sacrifice of property, and protect the debtor and other creditors from loss, by allowing them a time in which to redeem the premises from the purchaser; in others, they are valued by disinterested persons, and then delivered to the judgment creditor at that valuation. Whatever be the particular process, the property in the lands is taken from the judgment debtor, and transferred to the purchaser, by virtue of an execution issued to enforce and satisfy the judgment of a competent court.

§ 836. (3.) *Bankruptcy and Insolvency.*—A method of dealing with the estates of bankrupt traders has long existed in England, by which their entire property is taken from them and applied towards the payment of their debts. This system was unknown to the common law, and is the creature of statutes. It does not apply to all failing debtors, but is confined to the various classes of traders and persons engaged in commercial and mercantile pursuits. The two important principles of this system are, the appropriation of the debtor's estate to the payment of all his debts in equal proportions, and his subsequent discharge from further liability thereon. After the commission of some act of bankruptcy specified by statute, judicial proceedings may be instituted against the debtor to declare him a bankrupt, and thereupon his entire property in lands, chattels, and things in action, vests in persons specially appointed for that purpose. The estate thus transferred from the former owner by force of the statute, is applied rateably to the satisfaction of all claims against him, and he may be discharged

by order of the court from further liability upon any debts or demands then existing against him. It will be seen that this change of ownership is effected without the consent of the party, but as a consequence of his indebtedness and actual or presumed inability to pay.

§ 837. The Constitution of the United States grants to Congress the power to pass uniform bankrupt laws for the whole nation. The State legislatures possess the power to enact such laws, in the absence of any action by Congress. There are now no general bankrupt laws in this country, nor have the individual States any system resembling that of England. Most or all of the States, however, have adopted insolvent laws, which differ greatly in their special provisions, but which are all intended to afford to an insolvent debtor an opportunity of being freed from his indebtedness, or from imprisonment, by a voluntary surrender of his entire possessions to his creditors. The important point of distinction between these statutes and the English system is, that the transfer of his estate is effected by the debtor's own act, and not by force of the statute itself. The States are forbidden by the Federal Constitution from passing insolvent or other laws which impair the obligation of contracts, but agreements made subsequently to the enactment of such statutes are not within the prohibition.

I have now described all the principal methods by which property in things real or personal may be acquired or transferred.

## SECTION III.

### OF THE KINDS AND DEGREES OF PROPERTY WHICH MAY BE HAD IN THINGS.

§ 838. Property has been defined to be the dominion or ownership which may be exercised over things. Connected therewith and appertaining thereto as necessary elements, are various particular rights, which do not all however belong to every species of ownership, but are found united in

one alone. Among these attributes of property are the right to possess, use, control, or consume the thing; the right to protect and defend it; the right to transfer it. These may exist and be enjoyed, in some instances, in an unlimited, in others, in a restricted degree. Thus a right of property is sometimes found, not in connection with the actual possession, or even with the right of possession; in other cases it ends with the death of the owner, so that its transmission by will, distribution, or descent, is impossible; while in others still it is so restrained as to admit of no transfer. Property then, in respect to the degrees of power over the thing which it confers upon the owner, may be divided into two general classes; absolute, and qualified. Absolute property is an unrestricted right of ownership, and, when united with actual possession, embraces all the particular attributes which can belong to proprietorship, and constitutes the highest dominion which can be held over things real and personal. It involves an enjoyment of the thing unlimited in time, and untrammelled in manner. It includes the capacity to control, use, or consume the thing at discretion; and to transfer it, either wholly or partially, by any method known to the law; and to subject it to be taken, against the owner's will, in satisfaction of his debts. It is, then, at once the most important and the simplest species of property. Qualified property, on the other hand, is limited and restricted, and wants some of those attributes which pertain to the higher class. This limitation, which marks it as inferior, may relate to the time during which the right of property shall last, in which case it affects the *quantity* of interest held in the thing; or it may relate to the essential character of the ownership, in which case it affects the *quality* of the interest. These two general kinds of restraint are found combined in most species of qualified property, for any abridgment of the time for which dominion may be enjoyed, necessarily abridges the extent of the dominion itself. But there are limitations upon the quality

of the interest that may be had in things, which do not depend upon, and are not connected with, the idea of the duration of ownership. Property may also be considered in reference to the number of persons in whom it is vested. Whether absolute or qualified, it may be enjoyed by a single individual, in whom all the rights of the particular ownership centre; or it may be shared by several persons, among whom the total dominion is distributed.

These general principles will now be illustrated and applied to things personal and things real, and the various kinds and degrees of property in each will be briefly described.

## I.

### KINDS OF PROPERTY IN THINGS PERSONAL.

§ 839. Absolute property may be predicated of all species of things personal, whether material objects, as chattels, or immaterial rights, as things in action, and, when it exists, is always accompanied by possession, actual or constructive. When the right of possession is in one person, even temporarily, and the property is in another, that property is, so far at least, qualified. But the possession of the absolute owner may be constructive, as in the instance of articles entrusted to a servant for any special purpose. Absolute property over movables gives free power to use them at pleasure, and to transfer them in any method known to the law. It is the usual and familiar species of ownership, which alone we are accustomed in ordinary language to call property. In the case of things in action, the object of property is the intangible right, and not the material article. Thus the owner of a promissory note, a bond, or other instrument which creates an obligation to pay, has no property whatever in any particular money in the hands of his debtor, but is simply clothed with a right to demand and receive a certain amount of money. When the debt is paid, the thing in action ceases, and the property of the

creditor passes over from the mere right, and attaches to the money itself, which had been the debtor's, but which is now transferred to the other party. Absolute property in things personal ends with the death of the owner; or by a voluntary or involuntary transfer of the article from him; or by any act of his which creates a qualified property in another, and therefore limits that in himself.

§ 840. Qualified or special property in things personal may arise in various ways, and is of many kinds and degrees; but in all cases it is created to subserve some special purpose, and confers only such rights and powers as are necessary therefor, and ceases when that purpose is accomplished. It is therefore limited both in respect to its duration, and the capacity to use and transfer, which accompanies it. As an example of the highest kind of qualified property, we may take that held by administrators and executors in the movables of the deceased. This ownership confers many powers as to the use and control of the things, and even the capacity to transfer them and create an absolute dominion in the purchaser, but it is nevertheless qualified in that the trustee does not himself enjoy the benefits of this use and disposition. He is made owner for a special purpose, with such extensive rights as are necessary to accomplish that purpose, but which fall far short of complete dominion. So when articles are pawned or pledged as security for debt, the act of the owner creates a qualified property in himself and in his creditor. The latter is entitled to possession while the indebtedness lasts, with power to turn his special into an absolute ownership, upon the debtor's failure to pay according to agreement; the former still retains an ownership subject to, and modified by, that of the creditor, with the right to reclaim possession only upon the performance by him of his engagements. Many other instances might be given, but these will suffice to illustrate this subject.

§ 841. Things personal may belong to a single owner, or

to two or more at the same time. In the former case the property is said to be in severalty; in the latter, it is either a joint ownership, or an ownership in common. The vital distinction between joint ownership and ownership in common, is, that when the former species exists, upon the death of one owner his share vests in the survivor, who thus becomes sole proprietor; where the latter exists, upon the death of one owner, his share does not vest in the survivor, but passes to his administrators or executors, to be distributed according to the general rules of law. In this country, joint ownership is not favored, nor does it exist in the case of things embarked in trade or husbandry, for it is entirely incompatible with the enterprise and facility in the combination of capital which are the life of business. The property held by partners in trade, is a familiar illustration of ownership in common.

## II.

### KINDS OF PROPERTY IN THINGS REAL.

§ 842. While the rules which define the kinds of property in movables are few and simple, founded upon natural distinctions, those which relate to property in things real are far more numerous and complicated, and are based in great part upon ancient institutions. We have already seen the effects of the feudal ideas upon the methods of transmitting property in lands, and we should find, upon a careful examination, that the same causes had exerted an equally powerful influence in moulding the law as to the divisions and degrees of ownership, and the rights incident thereto. The English doctrine of tenures, which lies at the basis of their whole system, has been explained in a former chapter. I have also there defined the term allodial as applied to that kind of ownership which is not held from any superior, but which rests alone in the proprietor himself as the final repositary of dominion. These tenures, derived from feudal institutions, still subsist in England, and all land is there

said to be held from some superior lord. In the United States, with perhaps a few exceptions, these feudal ideas have been swept away by the legislatures, and all property in lands is allodial. The State is indeed the source of property, as far forth as lands revert to it in the cases of forfeiture and escheat, and as the title was originally derived from it; but this is not a feudal relation, but one which necessarily belongs to the body politic, in its capacity of supreme head over the individuals who compose it. While we have rejected the ideas of feudalism, we have retained some of its nomenclature, and not a few of its effects, yet the change has rendered our law much more simple than that of England. For a full and scientific comprehension of it, however, constant reference must be made to the ancient principles; but in so elementary a work as this, I shall give only a brief outline of the more important divisions of property in things real, and of the incidents thereof, as they are recognized by our general jurisprudence.

§ 843. An estate in things real of any description is the interest which the owner has therein, so that if a man transfers his estate, he parts with his entire interest. Estates may be absolute or qualified; and the qualification may relate to the quantity of interest, in which case it is measured by some duration of time which is limited; or it may relate to the quality of the interest. Estates, either absolute or qualified, may be considered in reference to the time when their enjoyment shall commence; and in reference to the number and connection of their owners. These four heads will be considered separately.

§ 844. 1. *Absolute Estates.*—An absolute property in lands is termed an estate in fee simple. It confers an ownership untrammelled by any restraints upon alienation, either by conveyance or by will; and upon the death of the proprietor intestate, it descends to his heirs generally, and is thus called an inheritance. It is unlimited as to duration, and can only be terminated or abridged by the

act of the owner, for, in the absence of all acts which would divert it from such a course, it will descend from ancestor to heir *ad infinitum*. The owner's rights extend not only to its absolute transfer, but to the creation of any other or inferior estates out of it, which may be allowed by law. By the common law, the use of the word heirs is necessary when this estate is to be created by deed, so that the land should be transferred to a person and his heirs. Without this formula, only an estate for life would pass. Many of the American States, however, have abolished this rule by legislative action. The term fee is borrowed from the feudal nomenclature, and signified the feud or fief granted by the superior lord to his vassal, and held by the latter in consideration of the required services. By far the greater portion of private lands in the United States is owned by the respective proprietors in fee simple, so that this is the common, almost universal species of dominion with which we naturally associate the idea of ownership in things real.

§ 845. The English law also recognizes qualified fees, in which the interest may continue forever as in fee simples, but is still liable to be terminated at the happening of some uncertain event. Another species of estates in fee, familiar to the English law, are those called estates in fee tail, or entailed estates, in which the land is confined in its descent to certain particular heirs, as, to the heirs of the original owner's body, in which case the property would be preserved among his lineal descendants as long as they continued; or to his male heirs, or otherwise. The effect of such entailment is to destroy the power of absolute transfer by any ordinary methods of conveyance, for no particular owner for the time being, has an absolute property in the lands, but they must follow the course originally marked out for them in the first deed which created the entail. This species of estates was invented to retain lands in the possession of families, and thus to enlarge their power and importance, and however it may be suited to the principles of an aris-

tocratic form of government and society, it is certainly opposed to our ideas of social and political equality. Estates in tail have therefore been long abolished in the United States.

§ 846. 2. *Qualified Estates.*—Under this general division, I shall first mention those estates which are limited as to the quantity of interest, and are measured by some restricted duration of time. These are not inheritances, for when they extend beyond the life of a particular owner, they do not descend to his heirs, but pass to his executors or administrators, to be distributed in the same manner as chattels. Those which are in use in this country are estates for life, and estates for years.

§ 847. (1.) *Estates for Life.*—Estates for life are such as are limited in their duration to the life of the particular owner, or to the lives of some other person or persons, and end at the death of the individual, or individuals, upon whom they depend. The absolute owner of lands may directly create life estates therein, either by deed or by will. In England, such a disposition of property is very common, in making provision for married women by ante-nuptial settlements, or for children, by will. In the United States, this species of qualified estates is much more rare, although occasionally resorted to in family settlements. Although they are permitted by our law, yet, as the habits of the people are opposed to any restraints upon the free transmission of landed property, and as during the continuance of a life estate this power of absolute transfer is suspended, they have not grown into frequent use.

§ 848. There are, however, life estates which do not result from the acts of parties, but which are created by the law, upon the occurrence of certain fixed events. These are known as the estate by courtesy, and dower. An estate by courtesy is the life interest which a surviving husband has, after the death of his wife, in lands which she owned absolutely, or in fee, during the marriage, but does not have an existence unless a child had been born of the marriage,

who might possibly inherit from the mother. When all these facts are found in connection,—a marriage, the birth of a child, and the prior death of the wife,—the common law grants to the husband an estate for life in the lands which she owned in fee at the time of her death. This right of the husband has been curtailed, or even abolished by statute in some of the American States, and it would seem that it no longer exists in those whose legislation has clothed wives with the unlimited power over their property which belongs to single women.

§ 849. Dower has already been defined as that life interest which the widow has in the third part of all the lands of which the husband was owner in fee at any time during the marriage, and to which she had not voluntarily abandoned her claim. The wife's interest commences at the marriage, and attaches to all lands then owned or subsequently acquired by the husband, and during the wedlock is a lien which cannot be defeated by any act of his. It is, of course, subordinate to all mortgages, judgments, or other encumbrances which affected the land prior to the marriage, or to the purchase by the husband, but has precedence of all such encumbrances as he himself may create during the marriage without her consent and joint act with him. To this general rule there is the single exception, that when the husband purchases land, and at the same time gives back a mortgage for the whole, or a part of the purchase money, the lien of such mortgage attaches before that of the wife's dower. If then the husband should convey away his lands, without joining the wife with him in such a manner as to cut off her claim, her right of dower will still follow the land in whosesoever hands it may be at her husband's death. The wife's dower is then a possible encumbrance, which may greatly interfere with the purchase of lands, and for this reason, some of the States have changed the common law, by enacting that dower shall only apply to such lands as are owned by the husband at his death.

§ 850. No act of the husband, done before the marriage, during its continuance, or at its close by his death, can avail to deprive the wife of this interest. She may, however, destroy, or, in technical language, bar it in various ways. When, by an ante-nuptial agreement to which she assents, a competent provision is made for her, as a separate estate to last through her possible widowhood, her entire right of dower is given up and barred. When such provision is made subsequent to the marriage, and is intended to be in lieu of dower, she is not bound thereby, but may elect between the two. She has the same privilege of choice, when the husband bequeathes property to her by will, which is expressly stated to be in place of her dower. Unless such intention is plainly manifested by the will, she takes both the dower and the bequest. The ordinary method for the wife to bar her right of dower in this country is simple and easy. Upon the husband's conveyance by absolute deed or by mortgage, she has only to join him in the execution of the instrument as one of the parties thereto, and to acknowledge it before a proper officer to have been voluntarily done, and her claim is forever cut off. The practice of both husband and wife uniting in deeds and mortgages is so common, that very few cases arise where the widow's interest attaches to any lands except those owned by the husband at his death.

§ 851. After the husband's death, the widow's dower may be assigned to her, or in other words, the specific one third of the lands may be set apart for her use. Should the heirs or devisees neglect or refuse to make such an apportionment, she may compel it by an action. In most of the States, a more summary method of assignment, under the direction of the Probate, Surrogate, or other similar courts, is in general use.

§ 852. The owner of a life estate of any kind has rights of property far more restricted than those which belong to absolute proprietors. He cannot so use the land as to do

any permanent injury to the inheritance, but may cut such wood as is required for fuel, fences, and other necessary improvements. He may, of course, use the soil for all purposes of cultivation, and when the estate is terminated by his death, his representatives may take such annual crops as are growing at the time. He cannot convey the land for any period longer than his own life, but within that limit he may transfer his interest to another, or it may be taken from him on execution.

§ 853. (2.) *Estates for Years.*—These are the lowest species of estates, because their duration is limited to a fixed and certain period. They are created by lease, and confer a right to the possession and profits of land for a determinate period, with the recompense of rent. However protracted their duration, even though for a thousand years, they are still considered as inferior to life estates. The person who creates the interest, is called the lessor, the one who receives it, the lessee. By statutes in England, and in this country, all leases for a time exceeding a certain short period (varying from one to three years in the different States), must be in writing. The powers of the lessee vary according to the agreements made between himself and his lessor. He may, unless forbidden by the provisions of the lease, either entirely transfer his rights to another, or underlet for a shorter period than his own estate.

§ 854. In describing these various species of estates, it must be understood, that any or all of them may co-exist at one time in respect to the same land. Indeed, there must be an estate in fee held by some person in all lands, in whose possession soever they may actually be, and whatever qualified estates therein may also be in existence. Thus, upon the death of an absolute owner of lands intestate, an estate in fee in the whole must descend to and be vested in his heirs; at the same time, the widow is owner of a life estate in the one third, and after her dower is set apart, she may lease her property, or any portion thereof

to tenants. In such cases, three degrees of interest in the same land would be simultaneous. The lessee for years would have actual possession; the widow would have no right of immediate possession, but has a claim to rent; while the owner of the fee simple has only a bare right of property, and can only join a right of possession to that property, at the death of the widow.

§ 855. I shall next briefly describe those qualified estates in which the limitation has more special reference to the quality of the interest held and enjoyed by the owner. As has been already remarked, this kind of restriction is also found in connection with those qualified estates which depend more directly upon the element of duration. Thus, in leases for years, it is common for the powers of the tenant to be circumscribed in various ways by the agreements of the parties, so that in addition to the restraints which the law couples with the mere fact of a fixed and definite termination to the right of property, the parties may add others which affect rather the essential character of the ownership. The two species of interest in lands which I shall mention in this class, are Mortgages, and Uses and Trusts.

§ 856 (3.) *Mortgages.*—A mortgage of lands is a conveyance thereof, by way of pledge for the security of debt, and to become void upon payment of it. The person who conveys, is called the mortgagor, and the one who receives, the mortgagee, and they generally stand to each other in the relation of debtor and creditor. The different estates or interests, with the rights and liabilities belonging thereto, of these two parties, I will briefly consider. The instrument is generally a conveyance in the form of a deed from the mortgagor, whereby he transfers to the mortgagee whatever estate he may have in the lands, with the clause added that this transfer is intended as a security for the payment of a certain sum of money by the former party to the latter, and the stipulation that upon such payment at a specified time, the conveyance shall be void. This provision is tech-

nically known as the condition of the mortgage. It is now customary to add also a clause empowering the mortgagee to sell the premises upon a default in the payment of the sum secured, which is called a power of sale.

§ 857. Mortgages have been known in England from an early day, and the rules of the ancient common law in relation thereto were exceedingly strict and severe. The conveyance was considered as working an actual transfer of the whole property; the mortgagee was regarded as the owner of the estate, and as such, might immediately take and hold possession thereof, subject only to have his interest and his possession ended by the payment of the debt at the time fixed in the deed. The mortgagor had no ownership in the land, but only the right to recover it by an exact fulfilment of his engagements at the appointed time. He was held strictly to his contract, and if the day for payment had passed by, the law declared his rights forfeited, the condition broken, the estate of the mortgagee absolute, and refused to compel him to accept the debt, and return the land. These rules of the law were certainly inequitable to the last degree, and the courts of equity long since interposed to modify and remedy them, and to equalize the rights of the parties, and to prevent these securities from being mere instruments to work injustice. They began by introducing the rule that time of payment was not an essential part of the contract, and that the mortgagee must be satisfied if he receive his money and interest, even though the day of payment had passed, and must thereupon surrender up the land to the mortgagor. From this commencement, these courts have steadily proceeded, until they have completely established the doctrines that mortgages are merely securities for the payment of debts; that the debt is the principal thing, and the mortgage is only collateral to it. The interests and liabilities of the parties as defined by Courts of Equity, and based upon this general principle, are now well settled in England and throughout the United States, and

the old rules of the common law have long been abandoned. Indeed, in several, if not most of the States, the results of the action of the Courts of Equity have been incorporated into the statutory legislation.

§ 858. The mortgage is now treated only as a security for the debt, and the mortgagor continues to be the owner of the fee, which is subject only to the lien or encumbrance created by his deed. His estate is technically called an equity of redemption, and is to all intents and purposes the absolute fee, and as such will descend by inheritance, or may be devised by will, conveyed by deed, leased, mortgaged subsequently, or taken and sold upon execution. The mortgagor is the actual owner, and may exercise all the rights of ownership provided he does nothing to impair the security. His rights and interest are not even injured by his mere default to pay the debt at the stipulated time, but continue until they are foreclosed and the lands sold as hereafter described. At any time before such foreclosure and sale, he may pay the debt and free his land from the encumbrance, and may force the mortgagee, by an action, to accept the money should he refuse. This right of redemption belongs not only to the mortgagor, but to all other persons who have a fixed interest in, or claim upon, the property; to the heirs, devisees, purchasers, judgment creditors, subsequent mortgagees and others. The effect of the mortgage is then simply to create a specific lien and encumbrance upon the mortgagor's estate, and to render it liable, upon continued default in payment of the debt, to be taken from him, or from whomsoever may have derived ownership from him, and to be sold in satisfaction of the claim.

§ 859. The mortgagee has, in fact, no estate in the land, but only a chattel interest, or thing in action, which may be transferred, and which passes to the executor or administrator at the death of the owner thereof. The rules which prevail throughout the United States in reference to the

recording of deeds of conveyance and the priority among them, apply also to mortgages. The mortgagee, or the person to whom his interest may have been transferred, has, however, the power to cut off, destroy, or in technical language, to foreclose, the mortgagor's interest and deprive him of his estate, when a continued default has been made in payment of the debt. This may be done in either of three methods; two of which are effected by means of actions, and the third, without any judicial proceeding. One of these is termed a strict foreclosure, in which the mortgagee institutes an action in a Court of Equity to procure a judgment declaring the lands to be his absolute property. By the second method a judgment is obtained ordering the premises to be publicly sold under the direction of the court, and the proceeds applied in satisfaction of the debt. In this action the rules of equity procedure require that all persons having interests in, or claims upon, the land arising subsequently to the mortgage, should be made parties, in order that their rights may be foreclosed together with those of the mortgagor; but at any time before the premises are actually sold, the mortgagor or owner of the land may pay the demand, and the mortgage will therefore be satisfied; or a subsequent encumbrancer by mortgage or judgment may pay the claim, and will thereupon be entitled to a transfer of the mortgage and judgment to himself, to hold as security for his advances. The purchaser of the premises at the public sale takes them free from all subsequent encumbrances which were foreclosed by the action; and even if a subsequent mortgagee, or judgment creditor, or other person having an interest, should not have been made a party to the action, he would only have a right to refund to the purchaser the amount of money which he had advanced, and thereupon to be substituted in his stead, and to succeed to the purchase. The money arising from the sale is applied first to the payment of the mortgagee's claim, and when that is fully satisfied, to the discharge of subse-

quent liens and encumbrances by mortgage or judgment in their order. If any surplus remains, it belongs to the mortgagor, or to the person whose rights of ownership were destroyed by the foreclosure and sale. The third method of foreclosure without an action consists in a public sale made by the mortgagee, or owner of the mortgage, in pursuance of the power contained in the instrument itself. This proceeding is regulated in the different States by statute. The sale must be publicly advertised for a specified time; notice must be given to subsequent encumbrancers; the same rights of redemption exist as in the preceding case; and the same results follow the sale.

§ 860. It is evident that these rules introduced by the Courts of Equity, are well calculated to protect the rights of all parties. The mortgagor does not forfeit his ownership by a simple failure to pay at the appointed day; and when the land is sold, the proceeds are applied as far as possible to the discharge of all the encumbrances upon it, and to that end it is for the interest of all parties that it should not be sacrificed, but should sell for its full value.

The object of the whole equitable doctrine in relation to mortgages, is, to enable the land itself to satisfy all claims and liens that may be upon it. This whole subject is a fine illustration of the principles and methods of equity, which are governed by no mere technical rules, but strive to do exact justice among all persons interested in the same subject matter.

§ 861. (4.) *Uses and Trusts.*—A general description of uses, and of their derivation from the Roman *fidei commissa*, having been given in a former chapter, it will be necessary to add but little to what has already been said. In its original meaning, a use is where the legal estate is vested in A., in trust that B. shall take the profits, and that A. shall make such disposition of the land as B. shall direct. This species of ownership was introduced by the ecclesiastics in the reign of Edward III. or Richard II. to evade certain statutes

which forbade conveyances to be made to religious houses. Proving successful for this purpose they were adopted by individuals in making transfers to each other, and at length became very common. This was at a time when the feudal incidents before described were in full force. A., owning an absolute estate in lands, would convey it to B. by a known and legal method, with an understanding that the latter should hold the land for A.'s benefit, or for the benefit of some third person. By this transfer B. became the legal owner, and his right was the only one acknowledged by courts of law. The interest of A. in the one case, or of the third person in the other, was called the use. The Court of Chancery, however, treated this use as a valid interest, and enforced the rights of the holder thereof, so that in time uses became an acknowledged species of estates. They might be created for years, for life, or in fee. This invention began to work a complete change in the law of real property, for it rendered the feudal incidents entirely nugatory, and thereby destroyed the rights of the lords. The rules which had been contrived by courts of law, applied to a certain well-known kind of ownership based upon feudal ideas, and the logic of the system would not permit an extension of these rules to interests in lands of an entirely different nature. Thus the holder of a use might readily transfer his right of property; he might devise it by will, although wills of land were not then permitted; and his estate might be altered and modified in many ways at his pleasure, for it did not come within any of the definitions and restrictions of the ancient law. His interest was called an equitable estate; while the bare legal title without any advantage of ownership, remained in the person to whom the land had been conveyed subject to the use. The privileges of the feudal lords were so much interfered with, that in the 27th year of the reign of Henry VIII., a statute was passed with the intention of destroying this judicial innovation upon the old simplicity of the law. It was enacted in substance, that

where a conveyance of land was made to A. for the use of B., no estate at all should vest in A., but the whole right of property should immediately pass to B., who should become owner of a complete legal estate of the same degree and character as the equitable estate or use, which he would have been owner of, prior to the statute.

§ 862. The result of this statute was to permit persons to create new kinds of legal estates, which the courts of law would recognize, and to introduce new kinds of conveyances. Almost all land in England is now held and conveyed in accordance with principles and rules growing out of this legislation, so that the English law of real property has been described as the result of feudal ideas engrafted upon a Roman stock. I need not stop, in so elementary a work as this, to describe these estates and modes of conveyance, which form one of the most intricate and abstruse portions of the English law, but which are happily little used in this country.

§ 863. The statute, however, was not able to accomplish its intention, for the legislation of courts proved more powerful than that of Parliament. In giving a construction to this act, the courts of law decided that when a conveyance was made to one person to the use of another to the use of a third, the whole legal estate passed directly to the second, and vested in him, and that the use to the last was inoperative. At this point the courts of Equity again interfered, and declared that although the whole legal ownership resided in the second individual, the third possessed an interest which should be protected, and a right which should be enforced. This interest is called a trust; the estate is a trust estate, and is identical in principle with the ancient use before the statute of Henry VIII. A trust then, as an interest in lands, is a creature of Equity, and is not recognized by law courts, unless otherwise provided by statutes. The person who holds the legal title is called the trustee, and the one for whose benefit the transfer is made, is often

termed the beneficial owner, or beneficiary. Unless otherwise controlled by statutes, trust estates are governed by many of the rules which apply to the ordinary legal estates in land; they may be for years, for life, or in fee; they may be inherited by the heirs of the beneficiary, or he may devise his interest by will.

§ 864. In addition to trusts expressly created by a conveyance or by will, courts of Equity have applied the doctrine with great power in many other classes of cases, to promote substantial justice. If land should be purchased by one person in his own name, but the consideration money should be actually paid at the time by another, Equity will treat the purchaser as trustee for the other, and regard the latter as the beneficial owner. In like manner, executors, administrators, guardians, assignees of insolvent debtors, and all persons who hold and manage the property of others for any special purpose, are considered as trustees, and are amenable to the Equity courts for the faithful discharge of their duties. Another class of trustees are those who have the management of corporations. These examples last given are not to be considered as relating entirely to the kind of ownership which may be had in lands, but rather as illustrations of the manner in which Equity treats those who are charged with such a particular duty as requires the possession and control of the property of third persons.

§ 865. The trusts in use in England and America are of two kinds, active and passive. In the former some confidence and duty is reposed in the trustee, and he is clothed with the actual power of disposition and management of the land, or chattels, and for that purpose holds the possession; in the latter, the trustee has the bare legal title; is the mere nominal owner, with no powers over the subject matter. The instances mentioned in § 864 are examples of active trusts. Others are those in which lands are conveyed to a trustee, to sell, mortgage, or lease them for the benefit of creditors, legatees, or others; or to hold and manage them and receive

the rents and profits and apply them to the use of any person. Trusts, as a species of private ownership, created by deed or will, are comparatively rare in the United States, and in some of the States the whole subject has been remodelled and reconstructed by statute.

§ 866. 3. *When the enjoyment of estates may commence.* —In respect to the time when the rights of ownership may be enjoyed, estates are said to be either in possession, or in expectancy; in possession, when the right of ownership is united with the actual possession and use of the land; in expectancy, when this use and possession are necessarily deferred to some future time. Right of property generally involves the right of an immediate possession, unless some intermediate estate or interest exists, which has the effect to postpone the possession itself. Nothing need be said in particular of estates in possession. They are the usual form of ownership, and have been impliedly described throughout the present chapter.

§ 867. Estates in expectancy are divided into two classes known as remainders and reversions. It is to be noticed that the term expectancy is used in a technical sense, and that these estates are something more than a mere hope of some time becoming owner of land. During the lifetime of a father, his children may have a strong expectation of succeeding to his lands and goods after his death, but they have no estate whatever, their hope is not a species of property. Expectant estates are more than such bare possibilities, they are actual interests in land.

§ 868. Remainders are always created by the act of an owner conveying by deed, or devising by will. Thus if a person who holds an estate in fee simple, should devise the land to his wife during her life, and after that to his children in fee, at his death the widow would immediately become owner of a life estate in possession, and the children, owners of an estate in fee in remainder. Their interest is a present right of property, but does not become enjoyable until the

happening of a future event, and is, in legal language, a remainder. If an absolute owner of land should by one deed grant an estate to A. for twenty years, and after the expiration of that period, to B. for life, and after his death, to C. in fee, A. would receive an estate for years in possession, while the interests of B. and C., although existing rights of property, would be remainders. These illustrations will make the definition of a remainder more clear. It is described by Lord Coke, as a remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the determination of that prior estate, and not in abridgment of it. Another writer defines it to be an estate limited to commence in possession at a future day, on the determination, by lapse of time, or otherwise, of a precedent estate created at the same time. In the illustrations above given, the precedent or particular estates were the widow's life interest, in the one case, and the estate for years, in the other. Remainders do not then have reference to the quantity or the quality of the interest, but solely to the time of its enjoyment; they may therefore be created in any description of estates. Estates for years, for life, or in fee, may be granted as remainders; the same is also true of uses and trusts. The elementary nature of this work does not permit me to give any description of the classes of remainders, nor any statement of the very intricate and abstruse rules which govern them. Indeed, to the practising lawyer of this country, these rules are chiefly to be studied as matters of curiosity, and as means of obtaining a scientific knowledge of the common law as a whole, rather than as principles which will be often applied in business.

§ 869. One important effect of creating successive estates in remainder either by will or deed, is to suspend for the time the unlimited power of alienation over the land. Thus if an estate is conveyed to A. for life, and a remainder to B. for life, and a remainder to C. in fee, the free transfer of the

land is suspended during the lives of A. and B. A. cannot convey the absolute interest in derogation of the rights of B., and when the latter comes into possession, he is under a similar restriction. It would be possible then for an absolute owner, by the provisions of a deed or will, to tie up his land for many generations, and thus to withdraw it from the commerce of the country. The policy of our legislation in reference to landed property has been to prevent as far as possible any attempts at limiting the capacity of free alienation. To this end entails were long ago abolished, and in most or all of the States the power of owners to create successive remainders has been greatly curtailed.

§ 870. A reversion is the estate left in a grantor, to commence in possession at the determination of some particular estate granted by him. Thus if the owner in fee were to convey away a life estate, the reversion would still be left in him, and he or his heirs would come into possession at the expiration of that life estate. Remainders must always be given to some person other than the grantor; reversions must always belong to the grantor or his heirs.

§ 871. 4. *Of the number and connection of owners.*— Rights of property in any particular lands may be enjoyed by a single individual, or by two or more in union. In the first case the ownership is said to be in severalty, and is the ordinary method of holding lands. When the ownership is distributed among two or more proprietors, it may be either joint, or in common. According to the rules of the common law, when any estate is conveyed or devised to several persons, they take it as joint owners, and as such their interest, their title, and their possession are united. Each has the entire possession as well of every part as of the whole. The peculiarity of this ownership is that feature called the right of survivorship. Upon the death of one joint owner, his interest goes to the survivors, and so on to the last survivor, who succeeds to the whole estate. No joint owner can therefore devise his share of the lands by will. This rule is

so antagonistic to the policy of our legislation, that joint ownership has been virtually abolished throughout the United States.

§ 872. Ownership in common bears some resemblance to that last described, but has none of its unjust incidents. It may be created by will or by deed, but usually arises in this country from a descent of lands to several heirs of the same intestate. The possession of owners in common is united, but each is the proprietor of a distinct and separate share of the land, although undivided from that of the others. His interest may therefore be transferred by conveyance, by will, by descent, or may be taken and sold on execution, and the person who succeeds to his rights of property, will also succeed to the united possession. Any owner in common may compel his fellow-owners to unite with him in making a division and allotment of their respective shares, which is technically called a partition. The object of a partition is to end the common proprietorship, to mark out and allot the particular parcel belonging to each, and to render him, as to such parcel, a sole owner.

## CHAPTER III.

### OF CONTRACTS.

§ 873. The portion of our municipal law, which, more than any other, controls all the business, and all the mutual relations of mankind, and constantly makes itself felt in the daily affairs of life, is that which refers to contracts. By far the greater part of the transactions in which society is engaged, consists in the entering into and performing of contracts of some description. "If these were all carried into full effect, the law would have no office but that of instructor or adviser. It is because they are not all carried into effect, and it is that they may be carried into effect, that the law exercises a compulsive power. Hence is the necessity of law; and the well-being of society depends upon, and may be measured by, the degree in which the law construes and interprets all contracts wisely, eliminating from them whatever is of fraud, or error, or otherwise wrongful; and carries them out into their full and proper effect and execution. These then are the results which the law seeks; and it seeks these results by means of principles; that is, by means of truths, ascertained, defined, and so expressed as to be practical and operative. These principles, in their most general form, may be said to be, first, those rules of construction and interpretation which have for their object to find in a contract a meaning which is honest, without doing violence to the expressions of the parties, or making a new contract for

them; and, secondly, those which discharge from a contract whatever would bring upon it the fatal taint of fraud, or is founded upon error or accident, or would work an injury. And if these elements of wrong are so far vital to any contract, that, where they are removed, it perishes, then the law annuls or refuses to enforce that contract, unless a still greater mischief would be done thereby." (Parsons on Contracts; vol. 1, p. 4.)

§ 874. A contract is an agreement, between two or more parties, upon a sufficient consideration, to do or not to do some particular thing. They are divided in respect to their form, into specialties, and simple or parol contracts. Specialties are those which are written and attested by a seal. Simple, or parol agreements are all others, and may be either written or oral. The element of distinction is merely the presence or the absence of a seal. With respect to the nature of the agreement, contracts are said to be express or implied. The former are those in which the parties have both definitely settled the terms of their compact either in writing or orally. The latter are those which the law raises or infers from the acts of the parties by reason of some value or service rendered, and because justice requires it. This species of contracts is simply the method which the law adopts to enforce many duties, and depends upon the very general principle, that whatever it is certain a man ought to do, the law assumes that he has promised to do. The Roman law used the same division; it spoke of obligations arising from express contracts, and of those arising from implied contracts. This classification, although similar in name, was not alike in meaning. The Roman jurists included in their express contracts, all those cases where an agreement was either actually made or presumptively inferred; in other words, both our express and implied contracts. Among their obligations arising from implied contracts (quasi ex contractu) were embraced many which we do not consider as springing from any kind of assent

or agreement. As remarked by a late very acute English writer, this division was intended by the Roman jurists to include all those obligations which could not properly be referred for their basis to contracts, or to wrongs. It was a classification of convenience, and not one founded upon any similarity of relations. Our law finds a duty resting upon a person, assumes him to have promised to perform that duty, and treats him as though he had actually promised. To illustrate; if one person labors for another at his request, without any agreement as to wages, the law declares that the employer, by virtue of his request, has entered into an implied contract to pay whatever wages are right. It will be readily seen that this class is by far the most numerous of any in the actual transactions of life.

§ 875. From the definition, it appears that there are in general four essential elements of every valid contract; viz., parties; an assent or agreement express or implied; a consideration; and the subject matter, or that which is to be done or not to be done. I will briefly treat of these elements in order, giving the more general principles of the law in relation thereto, and under the last, describing some of the more important species of mercantile contracts in common use.

§ 876. *Parties.*—With certain exceptions, all persons are permitted by the law to become parties to contracts and to bind themselves by their agreements. These exceptions include infants, married women, and those whose minds are unsound by reason of mental disease, or whose judgments are temporarily overthrown by reason of intoxication. Individuals affected with either of these disqualifications may indeed go through the form of an agreement, but while the disability lasts, and without a ratification after it is removed, their contracts are void. I have already spoken, in the first chapter of this part, of the special power of infants and married women. Lunatics, idiots, and persons intoxicated,

are incapacitated from contracting, because the judgment to decide and the will to execute correctly are wanting to them. The rights and liabilities of parties cannot be fully stated until I shall speak of the subject matter of contracts, for these rights and liabilities in each case must depend upon the very thing which they have undertaken to perform.

§ 877. There are some liabilities, however, which, depending partly upon the form and partly upon the substance, are common to all species of contracts. When the parties to a contract are so related to each other, that an obligation on the one side is undertaken by two or more individuals, or a right on the other is given to two or more individuals, that obligation, or that right, may either be joint, or several, or joint and several. The liability is said to be joint, when it must be enforced against all the promisers together; it is several, when it must be enforced against each one separately; it is joint and several when it may be enforced either against all together, or against any one singly, at the election of the other contracting party. The right is joint, when all the persons holding it must unite in its enforcement, several, when each one must enforce it by himself; joint and several, when either of these courses may be pursued. The ancient common law, in its construction of contracts, pronounced many liabilities to be joint, which would now be considered joint and several. The general rule is that when a right is conferred upon two or more, or an obligation undertaken by them, it is joint. Modifying this very general rule, is another, that the nature of the obligation or right is to be inferred from the terms of the contract if it be express, and from the intention of the parties, if it be implied. The interests of trade and commerce demand that in mercantile contracts the liability of the parties should generally be joint and several, and this is so declared by statutes in many instances, without reference to the express terms of the agreement.

§ 878. *Assent.*—The assent or agreement of the parties is another essential element of every contract. This must be mutual, complete, directed to the same subject matter, and of such a nature as to be obligatory. It is then a mental operation, and may be expressed by spoken words, by writing, and even by the acts of the parties. There must be in substance a request on the one side, and an assent on the other, so that the old Roman form of stipulation was in fact the very essence of every possible contract, tersely set forth in language. The agreement must also be entirely voluntary. If it be extorted by such violence, or restraints, or threats, that the will of the promiser is unduly constrained, which in legal language is called duress, the contract is entirely void.

§ 879. *The Consideration.*—It is a very ancient principle of our law that a consideration is an essential element of every contract. Every unexecuted agreement or promise without a consideration is absolutely void. In all contracts not under seal whether written or oral, this necessary feature must actually exist; in those under seal, on account of the peculiar solemnity and deliberation of their execution, the consideration will be presumed, and need not be affirmatively shown in order to establish the validity of the agreement, and the liability of the promiser. To this almost universal rule there is, however, an important exception, introduced in comparatively modern times to facilitate the operations of trade and commerce. This exception includes bills of exchange and negotiable promissory notes. As between the original parties thereto, these instruments, in common with all other valid agreements, require the presence of a consideration; but when they have been transferred before due, in the course of business, for a fair value, and without any notice of the defect, and have thus come into possession of a holder in good faith, they may be enforced by him, even though they lack this otherwise indispensable element.

§ 880. The Roman law classified the considerations

which might support a contract, into the four exhaustive formulas which have already been quoted, *do ut des*, *do ut facias*, *facio ut des*, and *facio ut facias*. Our own jurists do not attempt to arrange the several species of contracts under these four heads, but give a more general definition of the term consideration, which includes them all. A consideration is then something which is a benefit to the person promising, or an injury or trouble to him to whom the promise is made. When any valid contract is made, one or both of these two facts, the benefit to the promiser, or the detriment to the promisee, will be invariably found present. In this more general description, the division is also made of good, and valuable considerations. The former consist in blood relationship, or natural love and affection, which are considered as a benefit to the promiser; the latter consist in money, services, and the like, which are esteemed to be a pecuniary recompense, or equivalent thereto, and in marriage. That class of considerations technically called good, form no part of the contracts used in the ordinary transactions and business of life, and our attention will therefore be directed entirely to the other species.

§ 881. While the law thus demands that in these contracts there should be a valuable consideration, it does not require that it should be adequate; it does not stop to compare the extent of the advantage gained with that of the promise given, in determining the general validity of agreements, but looks only to see that some benefit accrues to one party, or some detriment to the other. Inadequacy may, however, often be a very strong indication of fraud in the execution of contracts, and in order to test the good faith of parties in their transactions, the amount of the consideration is often carefully inquired into.

§ 882. I will now state some of those instances of advantage to the promiser, or of injury to the promisee, which are frequent considerations of contracts. Of course the transfer of lands, money or any other chattel, things in action, or

any kind of thing which may be the subject of property, comes within this description and will support a contract. It is in virtue of this species of consideration, that contracts are said to be one method of acquiring property in things personal. So also work and labor or other services, done at the request of the person promising, are a sufficient and very common form of consideration; and this request need not be expressed in words, but will be implied from the acts of the party, such as the permitting the labor to be done, or the accepting and enjoying the benefit which it confers. But an actual transfer of property or performance of services is not necessary, for the mere promise made by one of the parties to a contract, is a sufficient consideration to sustain a corresponding promise made by the other. In this case both are benefited by the right which they obtain, and both are legally injured by the obligation which they assume. A very large portion of the ordinary contracts of business are of this form. Trust and confidence reposed by one person in another form a valuable consideration for the latter's agreement based upon such confidence. The prevention of litigation, and the refraining or agreeing to refrain for a time from the prosecution of valid claims by legal proceedings. are sufficient considerations for the promises of those who are benefited thereby. A careful scrutiny of those contracts which are employed in the usual transactions of life, would show that almost all depend for their validity upon some one of these enumerated species of consideration. Of course the greater number are included in the cases where a transfer of property is made, where services are rendered, or where a promise is given for a promise. When the consideration is illegal or impossible, the contract is void; when it entirely fails before the agreement is executed, the obligation to perform is no longer binding.

§ 883. In respect to time, considerations may be present, when the promise and the benefit conferred or injury sustained are simultaneous; they may be future, or executory,

where the benefit is to be conferred hereafter, and the promise of it is given now, to support the promise of the other party in return; or they may be wholly past, or executed. In general a past or executed consideration is not sufficient to render a subsequent promise valid, unless there was a request from the promiser, made prior to the act which constitutes the consideration. In the absence of such a request express or implied, the law does not consider the agreement to have been founded upon the past benefit, and regards it as entirely without any consideration. This request will, however, be often presumed, in order to prevent injustice.

§ 884. *The Subject Matter.*—The subject matter of a contract is the thing agreed to be done or not to be done. Its nature in any particular case determines substantially the rights and liabilities of the parties. It is impossible to describe these rights and obligations which may arise in every case, for contracts assume as many forms, relate to as many subjects, and contain as many provisions, as the constantly varying wants of society and business demand. There are some mercantile contracts, however, which are so important, are in such common use, through whose means the most of the world's business is transacted, that some description of them and of the rights and liabilities of the parties thereto, is necessary even to our elementary sketch of this subject. Among these are Sale, Bailment, Agency, Partnership, Bills of Exchange and Promissory Notes.

§ 885. *Of Sales.*—A sale is a contract whereby property in a chattel is transferred from one person to another in consideration of money or of a promise of money given in return. For a complete and effectual sale there must be parties, the thing sold, the assent, and the consideration. The rules as to parties have been already stated. The thing sold must have an actual existence, although it need not be in the possession of the seller. The agreement or assent must be complete and mutual, and may be oral, or

embodied in formal writings, or contained in letters. The price must be fixed and certain, or capable of being made certain without further negotiation between the parties. The consideration may be either money paid at the time when the sale is consummated, or a promise to pay at some future time. When by a provision of the contract, express or implied, the consideration is of the latter form, the sale is on credit. When the sale is completed the property in the thing passes to the purchaser; but this may be a qualified property only, for the right of possession may still remain with the seller. If the sale is for cash, the seller has a lien on the thing sold, and the right to retain it, until the money is paid; and if the article should be accidentally destroyed while in this condition, the loss would fall on the purchaser, and he would be liable for the price. But if the sale be on credit, the purchaser is entitled to immediate possession without payment, the consideration of the contract being then a mere promise. A sale is not complete so long as anything remains to be done to the article to put it into a condition to sell, or to identify it, or to separate it from other things.

§ 886. As between the parties themselves, the contract of sale is valid, in the absence of any statutory provisions, without a delivery of the chattèl to the purchaser; but in order that the latter may acquire a perfect title as against other persons, who have had no notice of the transaction, there must be an actual transfer of possession. A retention by the seller of the goods which he has sold, has always been considered as affording a strong presumption that the transaction was fraudulent as against his creditors or subsequent purchasers from him, and the presumption was once absolute, and could be removed by no explanation of the circumstances. In modern times the severity of this rule has been relaxed, so that, while non-delivery still throws a marked suspicion of fraud over the sale, it may be explained, and its evil effects removed. The delivery in all cases

need not be of the entire bulk of the article sold, but may be suited to its nature and situation. There must, however, be such acts as show a design on the part of the seller to divest himself of all control over the thing, and transfer it to the buyer. The statute of frauds, already described in a former part of this work, adds some further essentials to the validity of the contract of sale between the parties, by requiring that when the article exceeds in value a certain fixed sum (generally $50), there must be a memorandum in writing, signed by the party to be charged, or a delivery or part delivery, or payment of a sum of money as earnest.

§ 887. When a person sells a thing which is in his possession, he is said to warrant his title thereto; that is, the law adds to his express stipulations the additional agreement that he is the true owner, and has the right and power to sell, and he is liable to the purchaser if the contrary be true. But in regard to the quality of the chattel, our law has adopted a different rule. The Roman law, in respect to sales, contained the maxim *caveat venditor*—let the seller beware; and thus threw upon him the responsibility for such a quality of the goods as corresponded to the price. Our law says *caveat emptor*—let the buyer take care of his own interests; and thus throws upon him the responsibility of ascertaining the nature of the article purchased. In other words, no implied agreement in respect to quality is added to the express stipulations of the seller. He may, however, directly assume such a responsibility by incorporating a provision in his contract rendering him liable for defects in the thing sold. To this rule there are some exceptions, springing from the very nature of the case, from the inability of the purchaser in some instances to make that examination which the rule itself assumes. When a sale has been accompanied by a warranty of quality either express or implied, and the articles prove to be defective, the purchaser may either retain them and sue the seller for such damages as he has sustained; or he may, within a rea-

sonable time after the defect is discovered, return them, and sue to recover back the price paid, or defend an action brought against him for the price, if he has not paid. In the States of South Carolina and Louisiana the principle of the Roman law in regard to warranty has been adopted.

§ 888. But the law goes farther than those stipulations in reference to the title or quality of the things sold, which are termed warranties, and prescribes a certain amount of good faith and honest dealing on the part of the seller, in order that the contract may be free from fraud, and therefore binding upon the buyer. Strict morals would perhaps require that the seller should disclose all defects within his knowledge; but the municipal law falls short of this perfection. It does not stamp the mere silence of the seller with the character of fraud, for this would be only to introduce the doctrine of implied warranties under another name; nor does it forbid such commendation from him of the goods as may be extravagant, for this is only a matter of opinion; but if he use any false representations as to facts, or by any acts, or words, leads the buyer astray, the sale procured by such dishonesty is fraudulent and may be rescinded by the injured party.

§ 889. *Of Bailments.*—Bailment is a general term including a variety of special forms of contract, all of which, however, are based upon the same essential fact, which is the delivery of goods in trust, upon an agreement, express or implied, that the trust shall be duly executed, and the goods returned by the bailee, as soon as the purposes of the bailment are accomplished. The person delivering is called the bailor, and the one receiving, the bailee. The name is derived from the French verb *bailler*, to deliver. In every species of the contract, the bailee, as he assumes possession of goods not his own, is morally and legally bound to use them with care, and may be guilty of negligence toward them. Most of the rules of law in regard to this subject

are intended to fix the degree of this care which devolves upon the bailee, and the extent of the negligence which would render him liable, in all the possible cases which may arise in business. These rules are numerous and minute, and I can only give the very general principles from which they are all drawn.

§ 890. Legal text writers and courts have divided this necessary care into three grades: first, slight care, or that which absent and inattentive men apply to their own affairs; secondly, ordinary care, or such as every person of common prudence takes of his own concerns; thirdly, great care, or such as a man remarkably exact gives to the management of his own property. The want of this care measures the degrees of negligence. Gross negligence is the absence of slight care; ordinary negligence, of ordinary care; slight negligence, of great care. These divisions appear plausible, but they have been pronounced by many late writers and judges of great ability to be entirely artificial and utterly confusing, and there seems to be an evident tendency to abandon them. The degree of care in any particular case, must depend upon the nature of the thing bailed, the purposes of the bailment, and the interest of the bailee in the article. In respect to the latter two of these elements, an obvious classification of the several species of bailment has been made; but in respect to the first and most important, no classification is possible. The nature of the articles which are the objects of the contract must be so varying, that what would be great care in respect to one thing, would be gross negligence in respect to another which might be subject to the same species of bailment.

§ 891. The classes alluded to are three. In the first, the bailment is entirely for the benefit of the bailor, and slight care only is demanded from the bailee, and he is responsible for gross negligence alone. Included in this division are deposits of goods to be kept for the bailor without recompense, and to be returned upon demand; and mandates, in

which goods are taken by the bailee, who undertakes to do some act or service in respect to them gratuitously, in addition to their mere custody. In the second class, the bailment is for the sole benefit of the bailee, who is bound to use the greatest care, and is responsible for slight negligence. The only example of this division is the gratuitous loan of an article for a certain time, to be used but not consumed, and then returned. In the third class, the benefit is mutual, and the bailee is bound to use ordinary care, and held responsible for ordinary negligence. The species embraced in it are *pignus*, or pledge, and *locatio*, or the hiring of chattels. These latter contracts are very important, and merit a more particular description.

§ 892. A pledge is a delivery of things personal by a debtor to his creditor, to be held by him as security for the debt. The bailee has a qualified property in the thing, and may retain it until his claim is satisfied. He may not in general use it, unless its well-being requires it, but any profits acquired in this manner must be accounted for. He is bound to bestow ordinary care upon the pledge, but the degree of this care will depend entirely upon the nature of the article. The creditor cannot, before the debt is due, sell the pledge; but after a failure of payment at the appointed time, he may enforce the security, and make it effectual, in either of two methods. He may foreclose the debtor's rights by an action; or, after a reasonable notice to the debtor, he may sell the article himself, and appropriate the proceeds in satisfaction of his claim. The most frequent instances of this contract are the ordinary pawning to licensed pawnbrokers, and the pledging of stocks, or other things in action, as security for loans of money.

§ 893. Of *locatio*, or hiring, there are several different forms, the first of which is termed *locatio rei*, or letting to hire, where the hirer, for a compensation, acquires the temporary use of the thing. The article can only be employed for the purposes designated by the agreement, and must be

returned at the stipulated time, or within a reasonable time, if none was agreed upon.

§ 894. *Locatio operis faciendi* is where work and labor, care and pains, are to be bestowed upon the thing delivered, for a compensation, and includes the cases of mechanics employed to manufacture or repair the goods bailed to them; of warehousemen, who undertake the custody of goods; and of innkeepers, who receive the goods of their guests. The liability of mechanics and warehousemen is that already stated. The case of innkeepers is peculiar, and, together with that of common carriers, depends upon reasons suggested by public policy. The keeper of an inn is responsible not only for losses occasioned by his own negligence or that of his servants, but for those which no amount of foresight, or prudence, could have averted. He is held answerable for all loss, damage, or destruction of his guests' goods, except such as is caused by the act of God, or by public enemies, or by the fault or neglect of the owner. An act of God is such a cause as operates without any aid or interference from man, as a storm, or a stroke of lightning. This severe burden of responsibility has been mitigated by recent legislation in some of the States.

§ 895. Another form of the contract of hiring is that in which the bailee is to carry the goods for the bailor, from one place to another. Carriers are either private or common. The liabilities of a private carrier are those which generally belong to bailees of this class. Common carriers are those who undertake for hire to transport the goods of such as choose to employ them. The owners of all the vehicles of transportation by land or by water, which offer their services to the public, fall under this definition. The liability of the common carrier begins with the delivery of the goods to him, and continues until they are delivered by him. The same degree of responsibility rests upon him in reference to loss or damage as belongs to the innkeeper, yet he may limit his liability by a direct agreement with his

employer. Common carriers of goods and of passengers stand upon a somewhat different footing. The liability of the former does not depend upon the fact of negligence; while that of the latter is based upon this essential element, but from the peculiar nature of his business there can be no grades of negligence in his case; the slightest degree will suffice to fix a responsibility upon him.

§ 896. *Of Agency.*—The contract of agency is that by which one of the parties, the principal, either directly or by implication, confides to the other, the agent, the management of some business to be transacted in his name or on his account, and by which the latter assumes to do the business, and to render an account of it. It is a contract of most general use, being indispensable, not only to the operations of business, but to the daily pursuits of private and domestic life. As between the parties the contract is simple; the engagement of the principal is to pay some compensation, in consideration of the labor and services of the other; the engagement of the agent is to perform those services.

§ 897. But the most important rules of law are those which protect the rights of third persons dealing with an agent, and determine the question whether the latter or his principal are bound by his acts. There are two simple and equitable principles from which all these rules are drawn, and which are so evidently just, that their application is universal. The first is that the agent is the instrument of his principal, and his acts done actually or constructively by the latter's direction or assent, are done by the principal himself. This doctrine the law has compressed into the maxim *qui facit per alium facit per se.* The second principle is, that not only is a principal bound by the acts of one whom he has directly authorized to be his agent, but also of one whom, by his own conduct, he has induced others to believe was so authorized, when they have acted upon such belief. Having been the cause of the mistake, he must bear the consequences.

§ 898. Agents are general, or special; general, when they are authorized to do all of the principal's business, or all of a certain kind; special, when their authority extends to one or two particular things. An agency of either character may be constituted directly by a written or verbal authority from the principal; or may be presumed from the relations of the parties and the nature of the employment, or from the repeated acts of the agent adopted and confirmed by the principal; or may be established by a subsequent ratification. Another fundamental rule is, that a general agent, however appointed, has all the implied powers necessary from the nature of the business; and his acts will bind the principal, so long as they are within the ordinary scope of the employment in which he is engaged. On the contrary, if a special agent exceed his authority, the principal is not bound. As a corollary to this rule, while the agent confines himself within his authority, he incurs no liability to third persons with whom he deals; but when he oversteps it, so that the principal is not held, he himself becomes the responsible party. From these comprehensive doctrines are derived all of the more particular rules which have been applied by the courts to the innumerable cases continually arising in the transactions of business.

§ 899. An agency is terminated by the death of the agent; by the restriction of the power to a particular period of time; by the execution of the business; by a revocation of the power; and by the principal's death.

§ 900. *Of Partnerships.*—Partnership is a contract of two or more persons, to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions. The relation is to be viewed in two aspects: first, as it affects the rights and liabilities of the partners among themselves; and secondly, as it affects these rights and liabilities toward others. As between the individuals who compose it, a partnership can only be created

by an express agreement, which may be in writing or merely verbal. The provisions of this agreement, which are to determine the amounts contributed, the labor performed, and the shares of profits received or losses borne, by each, may be such as it is their pleasure to adopt. It furnishes the rule for settling the accounts of the concern among the partners, with the limitation that when it is deficient in any essential particular, the law will supply the deficiency by doing justice and equity as far as possible.

§ 901. But the relations of the partners toward third persons depend very little upon the nature of their agreements among themselves; for the law defines these relations, and it is not in their power to limit them. Indeed, there may be partnerships so far as third persons are concerned, cases where partnership liability is incurred, when no such community of interest, in fact, exists. In general, whoever participates in the profits, or suffers himself to be held out to the world as a partner, is liable to third persons as such. Each partner is responsible for the whole debts of the firm, and cannot restrict this liability by any agreement with his fellows as to his share of the losses.

§ 902. The most important rule in relation to this subject, which is found not only in the laws of England and America, but throughout Europe, is, that the whole firm, and all of its members, are bound by the acts and contracts of each partner with reference to the partnership business and affairs. This doctrine is a result of the community of interest which the members have in the common property, and of the agency which all bestow upon each. All that is necessary to fix the liability upon the firm is, that the act should be done within the scope of the partnership business, even though the results of that act should in no way benefit the firm, and even though they should be entirely diverted from their proper office by the individual member who does the act. This fruitful principle has been developed into many particular rules, and is applied to the innumerable

changing circumstances which arise in the affairs of business.

§ 903. The common property of the firm is regarded by the law as a fund devoted primarily to the payment of partnership debts, and cannot be taken by any private creditor of an individual partner, until these debts are satisfied. Such private creditor may, however, take and sell his debtor's interest in this fund, but will become entitled only to such share as remains after the partnership accounts are settled, the firm debts paid, and the amount of this interest is ascertained.

§ 904. Any member of a partnership may, in general, dissolve the firm at any time by withdrawing therefrom, or by selling his whole interest, or suffering it to be taken and sold on execution. It is also dissolved by the death of a partner.

§ 905. *Of Bills of Exchange and Promissory Notes.*— A bill of exchange is a written request or order from one person to another for the absolute payment of a certain sum of money. This form of mercantile contract was invented in Europe for the purpose of effecting the transfer of sums of money from one place to another, without the expense and risk of a manual interchange of the coin. Thus if A., living in London, has a sum of money in the hands of B., residing in Paris, which he wishes to obtain, he may draw an order on his debtor for the amount, sell it to C., who goes to Paris, carries with him the writing, and there receives the coin from B. By this simple method all parties are at last placed in the same position in which they would have been, had B. procured money to be transported from Paris to London, and had C. conveyed an equal amount from London to Paris. The convenience of this simple contrivance was so manifest, that bills of exchange soon became universal; and now the whole interchange of values throughout the world, and the balances of debt and credit for the entire commerce of mankind, are effected and arranged through their means.

The person who draws the bill is called the drawer; the one to whom it is addressed, and who is expected to pay, is the drawee, and after it has been presented to him, and he has promised to pay, he is known as the acceptor; the original party to whom payment is directed to be made is called the payee, and if he transfer and endorse it, the endorser; and generally any one who has possession and the right to collect it is termed the holder. A promissory note is a written promise to pay a certain sum of money absolutely. The person who promises is known as the maker, and the one to whom the promise is originally given, as the payee. These contracts are very similar in their incidents to bills of exchange, but were of a later invention. In describing the origin and uses of bills and notes, Prof. Parsons says:—"Money was invented as the representative of property, and as therefore greatly facilitating the exchange of all property, and as measuring its convertible value. The utility of this means enlarged, as the wants of commerce, which grew with civilization, were developed. But, at length, more was needed; it became expedient to take a further step; and negotiable paper, first bills of exchange and then promissory notes, were introduced into mercantile use, *as the representative of the representative of property*—that is, as the representative of money. Coin is itself a substantial article, not easily moved to great distances in large quantities; and while it adequately represented all property, it failed to represent *credit*. And this new invention was made, and negotiable paper introduced, to extend this representation another degree. It does not represent property directly, but money. And as in one form it represents the money into which it is convertible at the pleasure of the holder, so in another form it represents a future payment of money, and then it represents credit. And as names in any number may be written on one instrument, that instrument represents and embodies the credit of one man or the aggregated credit of many. Thus, by this invention, vast

amounts of value may change ownership at any distance, and be transmitted as easily as a single coin could be sent. And by the same invention, while property is used in commercial intercourse, the credit which springs from and is due to the possession of that property may also be used at the same time, and in the same way. And all this is possible because negotiable paper is the adequate representative of money, and of actual credit, in the transaction of business. And it is possible, therefore, only while this paper is such representative, and no longer; and the whole system of the law of negotiable paper has for its object to make this paper, in fact, such representative, and to secure its prompt and available convertibility, and to provide for the safety of those who use this implement, either by making or receiving it, in good faith." (Parsons on Contracts, vol. i., p. 203).

§ 906. The peculiar characteristic of bills and notes, that which distinguishes them from other written contracts for the payment of money, is their negotiability. By an ancient rule of the common law, things in action could not be transferred, so as to give the new proprietor complete rights of ownership; and even now, when such a transfer is possible, the purchaser takes them subject to all the defences which the promiser has against the original owner; he obtains only the identical rights and claims which this original owner could have enforced against the person who executed the contract. But with bills and notes the rule is different. As they were intended, and are used, as a medium of exchange, the most complete confidence in them is essential, and no holder should be obliged to enquire into the relations which may exist between the original parties, in order to discover whether the engagement is valid for what it purports to be. To accomplish this necessary object, the custom of merchants, early adopted and sanctioned by the courts, originated the rule that while, as between the original parties to a bill, its validity may be questioned, after a

transfer of the paper to a new holder, made in the ordinary course of business, for a valuable consideration, before the bill is due, all the promiser's defences are cut off, and he is liable to that holder at all events. Promissory notes acquired the character of negotiability somewhat later than bills of exchange, and in England a statute was passed in the reign of Queen Anne to place the two upon the same footing. Transfers made after the paper is due, or without a valuable consideration, or with notice of any defect, do not give the holder this important right, but leave the validity of the bill or note in his hands to be questioned by the promiser thereupon. That a bill or note may be negotiable, it must be payable to some person "or order," or payable to bearer. When payable to order, the payee negotiates and transfers it by writing his name upon the back, called endorsing it, and by delivering it to the new owner. This endorsement may itself be made to the order of the new holder, in which case he also must endorse the paper upon a transfer by him; or it may be the name of the payee simply, in which case the endorsement is said to be in blank, and operates to make the note payable to bearer. Notes originally made payable to bearer, and those which become so by a blank endorsement, are transferable without any subsequent endorsement, although it is the usual practice for each holder, as he parts with the paper to another, to add his own name upon the back.

§ 907. The rules of the law in reference to negotiable paper have for their object to ascertain the rights and liabilities of the parties thereto, the holders, the makers, the acceptors, and the endorsers. The rights of the holder are protected by the general doctrine last above stated; and so much so, that, provided he took the bill or note innocently, in the course of trade, for a valuable consideration, and before it was due, he may recover, even though it came to him from a person who had stolen it from the true owner, or who had obtained it by fraud, or even though it had already been paid.

§ 908. Bills of exchange are drawn payable at sight, or at so many days after sight, or at so many days after date. When payable at a fixed time after sight, they must be presented to the drawee for acceptance, and this act is the legal meaning of the term "sight." In the other two cases they need not be presented for acceptance until the day of payment. Where acceptance is refused, the other parties to the bill are to be notified of that fact in the same manner, and with the same effect, as hereafter described in the case of a refusal of payment. The acceptance is usually made by the drawee writing the word "accepted" across the face of the bill, and signing his name thereto.

§ 909. After the acceptance, the drawee, now called the acceptor, is in the same legal condition as the maker of a promissory note. Both are the parties to the paper primarily liable for payment; and the liability of endorsers of bills and notes, and of drawers of bills, only arises upon the failure of these principal parties to fulfil their obligations. The holder, if he has taken the proper steps, to be immediately described, may look to all the parties collectively, or to either one of them singly, for payment. If he recover the amount from the endorser of a bill, that person has in turn the right of recovery from those who precede him, and so the responsibility falls back to the drawer, and finally to the acceptor, who can have recourse to no one, for he is the principal debtor. The same is true of the parties to a note. An endorser or drawer who has paid to the holder, cannot, however, recover from any of the persons who became parties subsequently to himself. In this rule the law follows a plain dictate of justice. The acceptor of a bill is supposed to be indebted to the drawer, and the maker of a note to the payee. The drawer of the bill, and the payee of the note, transfer it for value received; the new owner in turn endorses it to another for value; and so the paper passes from hand to hand, each endorser receiving the value from

the one immediately subsequent to himself. If then the last endorser is obliged to pay the paper, he will have parted with its value twice, and the consideration which he gave to his immediate predecessor will have failed him. Plainly then he is in equity entitled to recover back from that predecessor what he has been forced to pay to the holder. And this one in turn is clothed with the same rights toward his prior endorser, and so through the whole series. And the same result will be reached, by allowing the holder, or any endorser who has paid him, to enforce the claim from either of the prior parties he may choose. But no such right exists for one party to recover from a subsequent endorser, for the value has already been received from him, and no amount paid to him. Thus the rules of law which regulate the liabilities of the parties to commercial paper, are not arbitrary, nor even based upon convenience alone, but are in accordance with the plainest equity and good morals.

§ 910. It only remains to enquire how the liabilities of the drawers and endorsers are to be fixed and made certain. Something plainly needs to be done to this end, for their responsibilities are evidently contingent upon the failure of the acceptor or maker to perform his obligation, and they cannot know whether this contingency has become an absolute charge, until they learn whether performance has been made or not. It is essential, then, that a reasonable attempt be made by the holder to obtain payment from the maker or acceptor, and that in case of failure, a notice of that fact be given in a reasonable time and manner to the drawer and each endorser. This the law requires, but it also requires still more. In most transactions, when the liability of one party depends upon the acts of another, the law judges of the reasonableness of the latter's proceedings by the peculiar circumstances of each case. But here it avoids all such enquiries, and lays down certain, fixed, peremptory rules, which must be followed in order to change the contingent

liability of these parties into an absolute one. To this end, on the day when the bill or note falls due, a demand of payment must be made upon the drawee, or acceptor, or maker, at the place appointed for payment, or at his house or residence or place of business, or upon him personally, if no particular place be appointed. When a particular place is appointed, such as a bank, which is the usual practice, the demand is made there; otherwise it may be made at the party's place of business or residence in his absence therefrom, or of him personally anywhere. Few circumstances will excuse this actual form of demand, and those only which show it to be absolutely impossible. The time of the demand is of the utmost importance. The law of England, of the United States, and of most commercial countries, allows a number of days in addition to those specified in the bill or note, which are called days of grace. With us their number is three. The demand must be on the last of these, within reasonable hours. In the great majority of cases bills and notes are made payable at banks, and the demand is made at the close of the banking hours on the afternoon of the third day. When that day falls on Sunday, or a general holiday, the second is the legal day for this purpose. A demand earlier or later than the proper day is equally insufficient to charge the drawer and endorsers. Of course if payment is made, all the parties are discharged and the functions of the paper are ended. But upon a failure to pay, a notice of the demand and refusal must be given to the drawer and endorsers by the holder. This may be either sent to all of these parties, which is the universal custom, or to the last one in order, who may transmit it to the one next preceding, and so on until all are notified. The notice may be and is generally in writing, and sent through the mail. It may be sent on the same day on which the demand is made, or must be on the one following. When the parties reside in the same town or city, the notice must be sent by a private messenger, to the drawer's or en-

dorser's place of business or residence; but this rule has been altered by statutes in some of the States, which permit a resort to the post office in all cases. It is not necessary that the notice be brought home to the party for whom it is intended; it is sufficient if the holder, within the limited time, starts it on its way. These several steps are necessary to fix the liabilities of the drawers and endorsers, and when they have been properly taken, these parties all become absolutely responsible to the holder for the amount of the bill or note, and their rights among themselves are the same as already stated. When any one of these steps has been omitted, or improperly done, all these parties are discharged from any claim of the holder, and of course from any liabilities among themselves. The acceptor or maker, however, will in general continue responsible to the holder, even though the latter has neglected to make a demand at the proper time.

I close here the subject of contracts; although there are some others of great importance in business, which would be described, did my limits permit.

## CHAPTER IV.

### LEGAL MAXIMS.

§ 911. Very many of the general principles of our law have been compressed into the form of short, pithy maxims, which are found scattered through the judgments of courts, and the works of text writers. Some of these were borrowed from the Roman jurists; others were struck into their present shape by the genius of some old English judge; all are of the greatest interest and importance, as they contain truths of more or less general applicability. It must not be supposed that they are all of equal value. Some, indeed, are the expressions of principles which lie at the very foundation of the municipal law as a system of rules whereby right and justice are enforced: others relate to special subjects or classes of subjects; to matters of public interest; to the orderly course of judicial procedure, and the ideas upon which it is founded; to the admissibility and effect of evidence; to the acquisition and ownership of property; to the construction of statutes, written instruments and contracts, and the like. I propose in this final chapter, to quote some of the more important of these maxims, and to give a very brief description of the meaning and application of each. As they are either extracted from the writings of Roman lawyers, or are the product of an ancient age of the common law, they are all clothed in a Latin garb.

§ 912. *Salus populi suprema lex.*—The public welfare is the highest law. From this principle are derived those rules which subordinate private rights as to persons and property, to the public good.

*Leges posteriores priores contrarias abrogant.*—Later statutes repeal prior ones to which they are opposed. In this maxim is embodied an expression of the supreme power which the legislature holds over the municipal law.

*Boni judicis est ampliare jurisdictionem.*—It is the duty of a good judge to enlarge his jurisdiction. We have here the essential idea of the continuous development of the law of judicial decision.

*Nemo debet esse judex in propria sua causa.*—No one ought to be a judge in his own cause. The truth of this principle is self-evident.

§ 913. *Ubi eadem ratio ibi idem jus.*—Like reason makes like law. This principle has been constantly acted upon by the courts in their deductions of legal rules from admitted premises, and the application of them to particular cases.

*Cessante ratione legis cessat ipsa lex.*—The reason of a rule of law ceasing the rule itself ceases, is another landmark to guide the judges in their work of judicial legislation.

§ 914. *Ubi jus ibi remedium.*—There is no wrong without a remedy. This is one of the most fruitful of legal principles, and I have already shown somewhat of its application by the courts at an early period, in devising new forms of action to meet new wants. And even at the present day it is constantly acted upon in applying the law to unusual circumstances.

*In jure non remota causa sed proxima spectatur.*—In law the immediate and not the remote cause of any event is regarded.

*Actus Dei nemini facit injuriam.*—The act of God is so treated by the law as to affect no one injuriously.

*Lex non cogit ad impossibilia.*—The law compels no one

to impossibilities. The impossibilities here meant are those which create a necessary and inevitable disability to perform the mandatory part of the law, or to forbear the prohibitory.

*Ignoratio facti excusat,—ignoratio juris non excusat.*—Ignorance of the fact excuses,—ignorance of the law does not excuse. In the latter portion of this maxim is contained the fundamental principle, that all persons must be presumed to know the law. An admission of the contrary would be virtually to abolish all law. But as to mistakes or ignorance of facts there is no such public necessity, and it would be inequitable to hold persons with the same rigor to the consequences of acts done by them in ignorance of the facts of the case.

*Volenti non fit injuria.*—That to which one consents cannot work him a legal injury. In accordance with this just maxim, no one can maintain an action for a wrong where he has consented or contributed to the act which occasions the loss.

*Nullus commodum capere potest de injuria sua propria.*—No one shall take advantage of his own wrong. This maxim is similar to the last, but is more positive in its prohibition.

*Acta externa indicant interiora secreta.*—Acts indicate the intention. This rule is of general application; but it is of special use in the criminal law, where the external acts are the only materials to which courts and juries can resort to judge of that secret intention which is the essence of crime.

*Nemo debet bis vexari pro una et eadem causa.*—No man ought to be twice vexed for the same cause. In this most important and salutary maxim is embodied the doctrine that the judgments of courts are conclusive between the same parties. It is a rule of public policy, that there should be an end of litigation; and the defence of *res adjudicata*, the matter has once been adjudged, if true, is good in all

cases, so long as the judgment stands. So far as it relates to criminal trials, our national constitution has incorporated the maxim into its bill of rights.

§ 915. *Qui prior est tempore, potior est jure.*—He has the better title who was prior in point of time.

*Cujus est solum ejus est usque ad cœlum.*—A man's property in the soil reaches to the sky.

*Quidquid plantatur solo solo cedit.*—Whatever is affixed to the soil belongs to the soil. These three rules have been illustrated in the preceding chapter upon property.

*Sic utere tuo ut alienum non lædas.*—So use your own property as not to injure that of another. This is a maxim of great importance, and of very general application. It shows that, however perfect a particular owner's rights of private property may be, they are limited by the fact that others also have their rights to the same extent, and the enjoyment of all must be protected against the misuse of any. The principle then goes further than the prohibition of an actual trespass upon the person or property of another. It reaches the owner within the limits of his own possessions. To this maxim are referred the rules of law against nuisances, which give a right of action to an individual harmed by a private nuisance wholly upon the land of another.

*Domus sua cuique est tutissimum refugium.*—Every man's house is his castle. The law is very particular to guard private dwellings against violence. So true is this, that the occupant is justified in killing thieves who come to the house to rob him; or persons attempting to burn or break open the house in the night time, or to break it open with intent to rob in the day time. So in defence of his house a man is justified in killing a trespasser who would forcibly dispossess him of it. A sheriff or other officer coming to serve an execution or any other process in a private suit against the occupant, may enter the house if the outer door be open, and, when thus in, may break open an inner

door if necessary; but he may not for such a purpose break open the outer door to effect an entry, even after a demand to be let in. The rule is not so if the officer come to arrest the occupant for a crime.

§ 916. *Interpretationes faciendæ sunt, ut res magis valeat quam pereat.*—Interpretations should be so made that the matter may be upheld, rather than overthrown.

*Verba intentioni, non e contra, debent inservire.*—Words should be construed according to the intention of the parties, and not contrary thereto. These are the fundamental maxims which guide the courts in the construction and interpretation of all written instruments and of statutes. The intention is to be discovered, if possible, and then carried into effect. These principles are most fruitful in results, and indeed contain in themselves the essence of all other rules of construction. The five following maxims also refer to the same general subject.

*Verba chartarum fortius accipiuntur contra proferentem.*—The words of an instrument are taken most strongly against the party employing them. This is intended to prevent the intentional introduction of ambiguous language; for the rule always adopts that meaning which is most prejudicial to the one giving the writing, and advantageous to the one receiving it.

*Certum est quod certum reddi potest.*—That is certain which can be made certain. This principle is evidently just and logical, and is of very common application.

*Falsa demonstratio non nocet.*—A wrong description does not make an instrument inoperative. This maxim refers to any erroneous description of a person or thing in a writing, and is to be taken with this limitation, that there must be a description sufficiently correct to determine what particular person or thing is meant.

*Expressio unius est exclusio alterius.*—The express mention of one thing implies an exclusion of another. This is one of the fundamental rules of interpretation, and is applied

especially to statutes, so as to prevent the extension of their commands or prohibitions to other things of the same class, when an enumeration of the subjects within their provisions is expressly made.

*Qui hæret in litera hæret in cortice.*—He who hangs in the letter hangs in the bark. This metaphorical maxim was doubtless first announced by some judge in the good old days of English archery. The figure is that of an arrow shot by a weak arm, which only hangs fastened in the outer bark, and does not pierce through into the heart of the tree. So one who contents himself with the mere language of an instrument or statute, without reference to its design and purpose, does not penetrate into its intention and meaning.

§ 917. *Modus et conventio vincunt legem.*—The form of the agreement and the convention of parties overrules the law. This and the following maxims contain some of the fundamental principles of the law of contracts, and their application can be seen from the preceding chapter.

*Quilibet potest renuntiare juri pro se introducto.*—Any one may renounce the benefit of a right or provision introduced entirely in his own favor. This principle is universal, and applies not only to those who may enforce substantial claims, but to those who have valid defences against claims brought against them.

*Qui sentit commodum sentire debet et onus.*—He who derives the advantage, ought to bear the burden.

*In æquali jure melior est conditio possidentis.*—When the right is equal, the party in possession has the stronger claim. This rule is applied in numerous ways, and to very different circumstances. Mere possession confers a good title to land or things personal as against other persons who have no better title. When two individuals have an equitable claim of equal weight, the balance inclines in favor of the one in possession. And the rule also applies to those who are equally guilty of a wrong.

*Ex dolo malo non oritur actio.*—A right of action cannot

arise from a fraud. This maxim has reference of course to a right of action in favor of the one who has committed the wrong; for in favor of the persons injured by it, fraud is always the source of rights which the law enforces with the utmost rigor.

*Ex nudo pacto non oritur actio.*—No right of action arises from a bare promise. In this maxim is contained that fundamental doctrine of the law of contracts, which requires the presence of a consideration in all cases.

*Qui facit per alium facit per se.*—He who acts by another acts by himself.

*Respondeat superior.*—Let the principal answer.

*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*—Every ratification retroacts and is equivalent to a prior command. The three preceding maxims contain a summary of the law of principal and agent.

*Vigilantibus, non dormientibus, jura subveniunt.*—The laws assist the vigilant, and not those who sleep over their rights.

With this enumeration of a few of those maxims which lie scattered like gems through the deposits of legal lore that have accumulated from an early age, I close the present work, not without hope that it may serve to convey to the reader some idea of the spirit of our municipal law, and inspire the student with some desire to comprehend the noble science of jurisprudence and legislation.

THE END. Finnay.

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